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No. 80-1350

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMUNITY COMMUNICATIONS COMPANY, INC.
Petitioner,

v.

CITY OF BOULDER, COLORADO, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Are home rule municipalities automatically exempt from liability under the federal antitrust laws by operation of the state action doctrine?

2. Assuming *arguendo* that the acts here complained of can be properly classified as "non-proprietary" or "governmental", is Respondent City of Boulder exempt from liability under the federal antitrust laws, because *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), is limited to "proprietary" conduct?

PARTIES TO THE PROCEEDING

Petitioner: Community Communications Company, Inc., a Colorado corporation and a wholly owned subsidiary of Tele-Communications, Inc., a Delaware corporation (see Appendix to Petition for Writ of Certiorari for List of Petitioner's Affiliated Companies).

Respondents: City of Boulder, Colorado; Boulder Communications Co., a Colorado corporation; Thomas Cross; I. Jack Kerner; Michael Thompson; Donald Passalaqua; Barry Telleen; and Dennis DuBé.

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No. 80-1350

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CITY OF BOULDER, COLORADO, et al.,
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ON WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 630 F.2d 704, and appears in the Appendix to the Petition for Writ of Certiorari ("P.A." herein), at A-1 to A-35. The opinion of the United States District Court for the District of Colorado is reported at 485 F.Supp. 1035, and also appears in said Appendix (P.A. at A-36 to A-46).

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on May 28, 1980. A timely petition for rehearing en banc was denied by order entered October 1, 1980. The Petition for a Writ of Certiorari was filed on February 9, 1981, within the time set by Order of Justice White, dated December 9, 1980. Certiorari was granted on April 6, 1981. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1966).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

The following constitutional provisions, statutes, and ordinances are quoted in P.A., at A-47 to A-69. Home Rule Amendment, Colo. Const. art. XX, § 6; Boulder, Colo., Ordinance No. 2846 (Oct. 6, 1964); Boulder, Colo., Ordinance No. 4472 (Dec. 18, 1979); Boulder, Colo., Ordinance No. 4473 (Dec. 18, 1979); Colorado Antitrust Statute, Colo. Rev. Stat. §§ 6-4-101, 6-4-102 (1974 & Supp. 1979); Municipal Powers Statute, Colo. Rev. Stat. §31-15-702(1) (1974); Sherman Antitrust Act §§ 1, 2, 26 Stat. 209, as amended, 15 U.S.C. § 1,2, (1976); Supremacy Clause, U.S. Const. art. VI, Cl. 2.

STATEMENT OF THE CASE

This case involves respondent's attempt to use its control over access to a competitive marketplace as a means of contractually implementing a market allocation scheme. The District Court below preliminarily enjoined this clear restraint of trade, but the United States Court of Appeals for the Tenth Circuit reversed, on the ground that respondent city is exempt from liability under the antitrust laws. The following facts are relevant.

On October 6, 1964, Colorado Televents, Inc. entered into a 20 year, revocable agreement with the City of Boulder, Colorado ("City"), which permitted, but did not require, the company to serve the entire City. The terms of the contract are set forth in Ordinance #2846. In 1966 Colorado Televents assigned its rights under the contract to Petitioner, CCC. Joint Appendix, at 9 ("J.A." hereafter). CCC restricted its service to a small area of the City which was foreclosed by geography from enjoying good, off-air reception of television signals. At that time, the economics of cable television and FCC regulations against the importation of distant signals prevented

CCC from expanding to areas in the City where cable television service was not a prerequisite to good reception. (Sparkman Tr. March 4, at 110:24-111:19; 113:17-114; Pilnick Tr. March 5, at 157:15-17).

From 1972 to 1974, Boulder initiated two requests for proposal (RFP) processes which sought bids from cable television companies interested in serving the City. The result of each process was the selection of one company to serve the entire City. At that time, the City imposed a provision on the new permittee requiring the "buy out" of CCC, although CCC never accepted such an arrangement. These companies, however, were unable to raise funds sufficient to build their proposed citywide systems, and CCC remained in operation. This fact validated CCC's conclusion in the early 1970s that it would be financially imprudent to expand to serve the entire city. (Sparkman Tr. March 4, at 115: 20-117:14; 118:10; Sample Tr. March 4, at 178:4-179:12).

In 1976, the economics and overall character of the cable television industry were dramatically affected by the advent of satellite technology which permitted cable television to bring subscribers numerous programs of news, information and entertainment not available to those without cable television service, thus providing the needed economic support for local origination of programming by the cable media. CCC therefore concluded that it was economically feasible to expand its system, and budgeted funds for that purpose in the Fall of 1978. (Sparkman Tr. March 4, 118:14-19; 123:5-10). CCC decided to allocate money for development of a citywide system, installation of an earth station, expansion of service, and the extension and rebuilding of existing facilities. (Sparkman Tr. March 4, 123:12-122:6).

May 5, 1979 to July 31, 1979: The City recognizes the possibility of open competition in the market raised by CCC's expansion plans and a permit application submitted by a new company, Boulder Communications Company.

The City had expressed interest in having its facilities, particularly the library, connected into the cable system. (Sparkman Tr. March 4, 128:10-15). Due to this interest, CCC wrote the mayor on May 9, 1979, informing her that the existing plant had been extended by one mile with construction

scheduled to proceed further in the summer. The letter informed the mayor that CCC planned to transmit satellite originated programming available only on cable television. (Ex. 6, Tr. March 4, 41:23-24; 42:3).(J.A. 4).

On May 24, 1979, Tim Chaffin, CCC's local manager, met with the library director and the City's designated cable television spokesman, Richard Varnes, to discuss CCC's expansion and the integration of the public library into the system. On May 25, 1979, Varnes wrote Chaffin applauding CCC's expansion plans:[1]

> "It is very exciting to see the system, at long last, moving towards fuller realization of its potential. We look forward to your addition of channels for Home Box Office, Madison Square Gardens, Christian Broadcasting, and the independents you mentioned . . . .
>
> "Thank you again for your time and for your commitment to bringing about a truly active cable system for the Boulder community." (J.A. 11).

Events were radically altered, however, when on July 1, 1979, Boulder Communications Company ("BCC") submitted its application for a permit to serve the City of Boulder with cable television. Significantly, the presence of CCC in the market did not deter BCC from seeking a permit. The letter accompanying the detailed application stated in part:

> "Whatever action the City plans to take in regard to [CCC], it is the plan of BCC to begin building its system as soon as feasible after the City grants BCC its permit." (J.A. 12).

CCC never opposed BCC's request for a permit, and always assumed that it would have to compete with those who qualified for and applied for permits.

While CCC continued its preparations for expanding its system, the submission of BCC's proposal caused the City to reexamine cable television at a City Council study session on July 31, 1979. City officials stated that CCC had complied with its contract with the City (Ex. 28, Tr. July 31, 1979 Study Session, 5:14-16; Tr. March 4, 171:21-24; 172:5), and the City Manager stated that CCC's expansion to date had not caused

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[1] Relying on its permit, CCC continued to develop its Boulder system, investing $900,000.00 by May, 1979—$300,000.00 of which could not be salvaged. (Sparkman Tr. March 4, 124:23-125:2; 126:15-17).

the City any problems (Ex. 28, 12:5-10). In fact, at the time, the City Manager discouraged any thought of impeding CCC's development because he felt CCC "may be acting in the public interest in the sense that they are broadening the offerings to our public without any involvement by us." (Ex. 28 32:20-22).

The submission of BCC's application made the City fully aware of the option for open competition in the market. (Westdyke Tr. March 4, 17:9-20; Ex. 28 8:15-17; 34:24-35:14; Correll depo. 66). Responding to a suggestion that open competition in the cable television market was not practicable, the City's cable television consultant said:

> "Mr. Sample: That may well be the case, but I don't know if we can say so. The economics have changed so dramatically with the advent of the satellite system. Thus it may literally be possible for one, two, three, four operators to operate within the City. In the past it has certainly been the case that in any kind of urban area you would not have been able to support more than one operator.
>
> Council Member Lefferdink: "The satellite is what has changed that; is that correct?" Mr. Sample: "Quite a bit. It's changed the economics quite a bit. And there are other kinds of services that are coming along in the next five or ten years." (Ex. 28, 13:18-14:4).

Although Sample did state that in his view it would be difficult to enter the market once one company had developed a citywide system, he advised the Council that "we may be entering into a period where if there are a couple of franchise holders, they may overbuild each other and compete for services. I can't tell you right now if that's going to happen or not." (Ex. 28, 23:20-24:7). He also advised the Council that it was physically possible to add numbers of additional cables and that the addition of these cables would not be cumbersome to the City. (Ex. 28, 23:20-21; 25:6-10). However, no permit was issued to BCC in July, 1979.

August, 1979 to December 4, 1979: Intense Lobbying By BCC and the City's Desire to Pervasively Control Cable Television Led to a Rejection of Competition In Marketplace.

Subsequent to the July study session, BCC began intensive lobbying of city officials. Denied a permit by the City in July, BCC pressed for revocation of CCC's permit, and for a

moratorium on construction by CCC pending the award of a new permit. Principals of BCC had private meetings not only with City Council members, but with the Mayor, the City Manager and the City Attorney. (Correll depo. 63-64; Danish depo. 15-18; Kerner depo. 100-25, 152-56; 167-78).

During the period of BCC's efforts, the City concluded that open marketplace competition among cable companies for subscribers would deprive the City of the leverage it needed to contractually control cable television and "exact tribute for its favor." (P.A. at A-44). The City was determined not to repeat the failure of its 1972-1974 efforts to replace CCC with a single operator willing to serve the City subject to extensive municipal control by contract. The City selected a request for proposals (RFP) process as the best means of locating the company most amenable to contractual control over such things as programming, rates, and day-to-day business operations.

The concept of true marketplace competition was incompatible with the goal of the RFP process. The cable consultant therefore stated that "competition for the actual cable plant is not conducive to the best public service, to the best entertainment package for the citizens." (Ex. 29, Tr. Nov. 29, 1979 study session, 2:19-22). The City Attorney advised the Council that "we have in this society recognized, especially since the Second World War, that the open competitive mode has some significant disadvantages." (Ex. 29, 37:2-4). The City Manager advised the Council of the perils of open competition, noting that while the strongest competitor might dominate, that competitor may not be the best. (Ex. Z, Tr. Boulder City Council Meeting, December 4, 1979, at 5).

Although the possibility of selecting more than one company following the RFP process was raised, the City's cable consultant recommended starting out with one company. (Ex. 29, 10:21). The City Manager also recognized the possibility that only one permit would be awarded (Ex. 29, 7: 23-24), and he favored an initial award to one principal operator (Ex. 29, 18:11). In sum, it was understood that the process considered by the City would result in the issuance of but one permit. (Ex. Z, 26:6-15). It was also understood that if CCC were unwilling to contractually accept new obligations in the form of amendments to its existing contract, the City would be justified in revoking CCC's permit. (Ex. Z, 33:22-34:2; Ex. 28, 44:21-24; 45:9-12).

In order to justify this retreat from actual marketplace competition, City officials adopted the position that cable television was a natural monopoly and that open competition among firms seeking the same subscribers would be fruitless. Without even attempting to issue multiple permits to promote competition, City officials predetermined that competition *in* the market was very remote (Ex. 29, 26:25) and decided that the only competition that *could* exist in Boulder was competition *for* the market, through a process which allowed City officials, rather than subscribers, to decide which company would, in effect, replace CCC. (Sample Tr. March 4, 207:23-208:4).

To support their predetermination that true marketplace competition was not feasible, City officials relied on a letter from CCC's potential competitor, BCC. On November 28, 1979, Jack Kerner, President of BCC, wrote Mayor Correll about the RFP approach which he had learned the City was considering:

> "If the Council approves a request for bid approach, the existing permit must either be revoked or the permit holder must agree not to expand. If such is not the case, the requst for bid is a sham since no company will bid knowing that TCI is building while it is bidding . . .
>
> "We suggest the City revoke the TCI permit, grant us a new permit consistent with the new policy ordinance and allow us to bring cable service to Boulder. In the event the City were to take this approach, we would purchase the TCI system and maintain service to its subscribers." (J.A. 16).

Adoption of the Moratorium: The City Does By Forced Agreement What It Concedes It May Not Do Under The Police Power.

Since pervasive and monopolistic controls over cable television are not required to protect municipal rights of way, the City Attorney evidently recognized that the police power could not be used to adopt the City's cable television scheme. In a memorandum submitted to the Council, the City Attorney advised the Council that an ALR annotation [41 ALR 3d at 284] and a Colorado PUC decision issued in 1968 (P.A. at A-70) had concluded that cable television was not a natural monopoly. The memo also quoted from that section of the PUC

decision which had concluded that cable television was not a public utility and that state legislation was required to afford a basis for anticompetitive regulation of cable television in Colorado. (J.A. 20).

The memo then turned to the effect of *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), on the City's contemplated action. Although characterizing this Court's test as "quite vague," the City Attorney stated that "The *City of Lafayette* decision requires that an explicit state policy to displace competition with regulation or monopoly public service be shown prior to a recognition of the [antitrust] immunity." (J.A. 22). After citing to a memo prepared by the Colorado Attorney General, the City Attorney stated:

> "[T]hus, the scope of regulation permitted by the City's control over access to the public rights of way may be restricted, just as the City's power to regulate competition is restricted under the *City of Lafayette* case, to the extent that the state law has delegated responsibility to home rule cities to regulate cable communications." (J.A. 24).

The City Attorney, however, found a way out of what could be interpreted as a prohibition against anticompetitive arrangements and the unilateral imposition of controls beyond those justified by the police power. Pointing to a 1968 Illinois case, the City Attorney observed:

> "On the other hand, these procedural objections may be overcome by the use of non-exclusive contractual undertakings (*See*, e.g., *Ill. Broadcasting Co. v. City of Decatur*, 238 N.E.2d 261 (Ill.App. 1968), which held that even though many of the conditions of the cable communications ordinance could not be imposed by the City, the grantee could agree to them." (J.A. 22).

The City Attorney therefore concluded that the City could exact concessions beyond those warranted under the police power by conditioning the use of the public right-of-way upon contractual undertakings by a company selected through a bid process. CCC's compliance with a moratorium could be obtained in the same way:

> "[I]n the event that TCI is unwilling to accept a moratorium, the same purpose can be achieved with a greater measure of legal certainty by revoking the existing permit and granting a new permit, which, upon acceptance

of TCI by performance, would permit TCI to continue to operate in the area in which it now operates with its current cable communications system." (J.A. 24).

On December 4, 1979, the City Council decided against simply issuing additional permits under the police power. Instead, the Council adopted a resolution directing City staff to draft a model ordinance (*i.e.*, a cable television contract) which would serve as a basis for an RFP process as well as other ordinances imposing a ninety day moratorium on CCC's efforts to expand its offerings and area of service as it was contractually entitled to do. (Ex. Z, 50:17-22).[2]

The city staff did prepare a draft model cable television agreement which would impose numerous obligations on the company issued a permit following the RFP process. Although the City refers to the draft agreement as "regulation," it in fact far exceeds the scope of any legitimate police power concern, as the City's desire to exact concessions from and pervasively control a chosen cable television disseminator.[3]

On December 18, 1979, the City Council was presented with two ordinances proposing a moratorium on CCC's expansion. The City Attorney advised the Council:

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[2] Throughout the litigation, the City has maintained that its consideration and eventual adoption of a moratorium was pro competitive in character. The City has repeatedly referred to statements in the Council sessions of City officials expressing concern that competition would be foreclosed by CCC's unfettered expansion. Petitioner emphasizes that the "competition" contemplated by these officials was competition for the right to engage in the cable television business in Boulder, not competition in the marketplace for subscribers. (P.A. at A-32). Moreover, the City has never really explained why it was foreclosed from granting an additional permit to BCC in July, 1979.

[3] Among the features of the proposed contract were: The City's right to purchase the cable company at a price excluding any goodwill but limited to depreciated investment in plant (Section 4[c]); the right of prior approval of every contract to be executed by the company (Section 4[c][3]); rate regulation (Section 5); the right to change rates at any time regardless of prior agreement on a rate schedule (Section 5[b]); a 5% franchise fee (Section 6[a]) which is two and one-half times higher than the present fee; a requirement that the company provide five leased access channels (Section 7[d]); a complaint procedure monitored by the city manager which includes a liquidated damage provision (Section 8[a][d]); a requirement that the company upgrade its facilities continually to state-of-the-art conditions (Section 7[d]); and finally, a requirement that at specified intervals during the contract term certain obligations of the company are to be renegotiated, including rate structures, free or discounted service, services provided and programming offered, and human rights (Section 8[c]). (J.A. 31-51).

> "I do not believe that the city enjoys *Parker* immunity in this case under the *City of Lafayette* decision .... I do not personally see an immediate anti-competitive impact, although, there is clearly a restraint of trade at issue." (Ex. A-1, Tr. Dec. 18, 1979 City Council Meeting, 4:24-5:7; Tr. March 6, 5:21-22; 6:19-20).

The Council then enacted two moratorium ordinances; Ordinance 4472 repealed and reenacted CCC's permit with added sections restricting CCC to areas then served for a period of ninety (90) days. Imposing the restriction by contract, Section 12 of the Ordinance stated:

> "The Grantee shall signify its acceptance of the terms hereof by continuing to provide service to any customers presently served by the Grantee." (P.A. at A-55, A-60).

Ordinance 4473 was an emergency ordinance immediately limiting CCC's use of City rights-of-way to areas of the city served on December 18, 1979. (P.A. at A-62).

On January 15, 1980, CCC filed its complaint in the Court below, alleging violations of antitrust laws, CCC's First Amendment rights, and rights guaranteed to it by state law. CCC informed the City that it considered the ordinances invalid, and that it would continue its development work. The City responded by filing criminal complaints against CCC and its contractors. Thereafter, on February 4, 1980, the City filed a state court action for injunctive relief. (*City of Boulder* v. *Community Communications, Inc.*, Boulder District Court No. 80-CV-0198). On February 6, 1980, the State District Judge denied the City's request for injunctive relief, pointing out that the federal court already had assumed jurisdiction and that, in any event, the City had not convinced him that it would prevail on the merits, that significant First Amendment issues were presented, and that the equities favored CCC. (Ex. 20; Tr. March 4, 170:2, 21).

The City nevertheless resorted to self-help, and began destroying CCC's cable. Under duress, CCC agreed to stop building pending judicial action, and petitioned the federal district court for injunctive relief.

The Injunction Hearing

On March 4, 1980, the District Court below commenced preliminary injunction proceedings to determine whether the City should be barred from interfering with CCC's plans to

expand its programming and audience in Boulder, Colorado. The trial court heard live testimony from eight witnesses and had available the transcripts and tapes of City Council sessions and several hundred pages of deposition testimony. Following that testimony, there was extensive oral argument. (Tr. March 6, 65 *et seq.*).

The City Manager testified that open competition would have been possible (Westdyke Tr. March 6, 17:9-18:15), but that it was not considered desirable because competition might favor the strongest cable disseminator rather than the one the City deemed "best." (Westdyke Tr. March 6, 29:12-16, 32:21-33:3). The City's consultant shared this view. (Sample Tr. March 4, 183:22-185:7; 207:5-14).

As the respondent notes, a witness for the City, Carl Pilnick, did testify that in his view cable television was a natural monopoly. *See* Opposition to Petition for Certiorari, at 6 n. 10 ("Opp. Br." herein). He based his conclusion on what he perceived to be physical and economic barriers to competition. Mr. Pilnick's assumptions were, however, controverted by other evidence. For example, the court learned that a device known as an F Cable Arm allowed multiple cables to be unobtrusively installed. (Olsen Tr. March 6, 55:7-57:9.).

Mr. Pilnick also testified that costs to a second cable operator to rearrange utility lines might be much greater than that borne by the first, thus precluding competition. However, Mr. Pilnick had never been to Boulder. (Pilnick Tr. March 5, 124:4-18). CCC's construction coordinator, Nicholas Olsen, had toured Boulder and reviewed configurations for each of the 3,924 utility poles in Boulder (Olsen Tr. March 6, 49:22-25; 51:1-5; 60:24-25; 63:18-19), and determined that the actual cost to the second operator would be approximately the same as that borne by CCC (Olsen Tr. March 6, 57:20-22; 59:24-60:24).

On the subject of economic barriers, the trial court had before it the 1968 decision of the Colorado Public Utilities Commission which doubted that cable television was a natural monopoly and concluded that, in the absence of state legislation, cable television should be treated like any other business, i.e., issued a routine business license and allowed to compete for subscribers with other suppliers of cable television programming, no two of which are the same. (P.A. at A-87 to A-88).

The trial court also had before it comments given to the City Council by its cable consultant which expressed doubt as to whether cable could be classified as a natural monopoly, noting that "the economics have changed so dramatically with the advent of the satellite system" that "it may literally be possible for one, two, three, four operators to operate within the City." (Ex. 28, 13:19-22). Mr. Sample had also advised the Council that "we may be entering into a period where if there are a couple of franchise holders, they may overbuild each other and compete for services." (Ex. 28, 23:20-24:7). Mr. Pilnick also testified about the effect of satellite technology on competition.

> "I think that with the penetration getting higher in general because of new services, then the possibility of more than one cable company in a market is becoming more real now than it was before, yes I would agree with that." (Pilnick Tr. March 5, 105:21-24).

On March 17, 1980, the District Court issued its Memorandum Opinion and Order. After reciting the events leading to the imposition of the moratorium, the court focused on antitrust concerns and, in particular, whether "Boulder's action in imposing the moratorium [was] an unlawful interference with the plaintiff's business and with free market competition?" (P.A. at A-40). Although erroneously reading *City of Lafayette* as a case simply restricting *Parker v. Brown,* 317 U.S. 341 (1943), to governmental actions of both state and local governments, the court made several critical findings of fact. First, it found that actual competition in the modern cable television marketplace is possible and will probably materialize if cities do not prevent it:

> "I disagree that the evidence shows that cable television is such a natural monopoly that the only feasible competition is in the process of currying favor with the City Council to obtain a permit to operate. To the contrary, the evidence is that there can be competition in the marketplace, with the choice of price and service left to the consumers." (P.A. at A-43).[4]

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[4] Facts relating to the "natural monopoly" issue have been included here because the City has fixated on the issue, and raised a false alarm which may have influenced the Tenth Circuit. *See, e.g.* Opp. Br. at 38 n.4; 4-6 & nn. 10-11. However, the City's natural monopoly "argument is today simply fallacious" (P.A. at A-18; Markey, J., dissenting), as the trial court expressly found as a matter of fact. (P.A. at A-43). This factual issue should not be

(footnote continued on following page)

The trial court also found that the City's true interest was not police power regulation, but contractually negotiating benefits such as "better" programming, free service for public buildings, and greater cash payments.[5] The court therefore found that the City's actions had a proprietary motivation, thus precluding *Parker* state action immunity. It also found that the 90 day moratorium was part of a market allocation scheme, designed to preserve a virgin market so it could be awarded on monopoly terms. The trial court thus granted a preliminary injunction to preserve the *status quo* and prevent irreparable harm to CCC and the viewing public.

The Tenth Circuit Appeal

The District Court's March 17, 1980, injunction order was handed down on the 89th day of the moratorium. The City had received all responses to its request for proposals, and CCC had

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(footnote continued from preceding page)
retried to this Court. The "natural monopoly" argument is irrelevant to the questions presented to this Court for decision—whether *Parker* extends blanket immunity to home rule cities and to all other non-commercial municipal conduct. The exemption issues which the Court is asked to resolve do not require consideration of the sufficiency of the City's "natural monopoly" defense as a bar to eventual liability premised on the City's admitted restraint of trade. No doubt further evidence will emerge at trial on this issue should petitioner prevail in this Court.

It must also be stressed that, even if valid, the natural monopoly argument totally fails to justify anticompetitive conduct, and is irrelevant to immunity issues. The correct phrase for a "natural monopoly" is "thin market." L. Sullivan, HANDBOOK OF THE LAW OF ANTITRUST, § 45, at 115 (1977) (a thin market is a market which will support only one supplier). The City essentially argues that it should be allowed to determine in advance that a market is a thin market, and then should be allowed to designate the monopolist. Both actions would be illegal under the antitrust laws. Whether a thin market exists can only be determined by the free play of competitive forces. *See, e.g., Union Leader Corp. v. Newspapers of New England, Inc.*, 284 F.2d 582 (1st Cir. 1960). Even if a municipal predetermination of thin market status was not illegal, the City still could not designate a monopolist. The antitrust laws require that an "elimination bout" determine who the supplier shall be in a thin market, which cable television is not. *Id.* at 584 n.4.

[5] P.A. at A-42. The City apparently planned to create *de facto* monopoly privileges in exchange for such benefits. The City has tried to characterize CCC as a *de facto* monopolist, but in fact the City alone is responsible for the present marketplace conditions. CCC rejects the notion of restraining trade in the cable television market, whereas the City has used its control over access to the market and to essential facilities (the public rights-of-way) to preclude competition in favor of a veritable auction of a monopoly to the highest bidder. This runs counter to established antitrust doctrine. *See, e.g., Hecht v. Pro Football, Inc.*, 444 F.2d 931 (D.C.Cir. 1971), *cert. denied* 404 U.S. 1047 (1971).

not done any meaningful development work during the moratorium. (Ex. B-1 through E-1, Tr. March 6, 5:23-6:13; 6:18-20). An appeal was nonetheless taken, even though the moratorium was allegedly a temporary, one-time affair, and the City Attorney had advised the Council that the imposition of a moratorium after the receipt of bids would be "extremely dangerous" (J.A. 24), and had emphatically denied any intention to revoke CCC's permit (deRaismes Tr. March 6, 90:23-91:2). Following an extremely expedited briefing schedule, the Court of Appeals heard oral argument on May 9, 1980.

On May 28, 1980, the Tenth Circuit majority reversed the preliminary injunction order. Focusing on the immunity issue, the majority disagreed with the trial court's finding that the City's moratorium was designed to facilitate a bargaining strategy, and thus involved proprietary conduct. It concluded instead that similar contractual control over cable television must have existed in the Colorado home rule city of Vail, and that such control is inoffensive because the Colorado Supreme Court did not discuss the issue when deciding a case involving other cable television issues and Vail. See *Manor Vail Condominium Ass'n v. Town of Vail*, 604 P.2d 1168 (1980). The Tenth Circuit construed this silence as implied Colorado Supreme Court approval of what the City of Boulder had done. The Tenth Circuit also inferred from *Manor Vail* that cable television involved only matters of purely local concern, contrary to the trial court's express finding of fact. The Tenth Circuit thus held that Boulder's actions were governmental in character and, since dealing with a matter of local concern, were to be treated as actions of the State entitled to antitrust immunity under *Parker*. The Tenth Circuit explicitly recognized that there was no state legislation or other policy regarding cable television, but treated this fact as mandating, not denying, the grant of immunity. (P.A. at A-7).

The Tenth Circuit also confined *City of Lafayette* to cases where cities are "in the . . . business" (P.A. at A-6), and found that the City had complied with *California Retail Liquor Dealers' Association v. Mid-Cal Aluminum, Inc.*, 445 U.S. 97 (1980), because Boulder's own policy in effect represented a "state" policy to displace competition which the City itself had actively supervised by enforcing the moratorium.

On July 1, 1980, Chief Judge Howard T. Markey of the United States Court of Customs and Patent Appeals, sitting by

designation, filed his dissent. (P.A. at A-10 to A-35). Although emphasizing First Amendment issues which had been raised by CCC, the dissent also found no basis for antitrust immunity in the absence of any state policy to displace competition:

> "No state policy whatsoever exists in relation to cable TV. The subject is not mentioned in Colorado's constitution or in any state statute. The Colorado Public Utilities Commission has declined to exercise jurisdiction over cable television. [Citation to PUC Decision 70749, A-70.] With no policy whatever on regulation of cable TV, by cities or otherwise, it can hardly be said that Colorado has a state policy 'to displace competition' in cable TV with regulation or monopoly public service. Much less can it be said that Colorado has a comprehensive, clearly articulated, affirmatively expressed, actively state supervised anti-competitive policy for cable TV." (P.A. at A-26 to A-27).

The dissent also viewed the City's post-moratorium decision to appeal as an ominous indication of future activity.[6] Notwithstanding the City Attorney's statement in open court that districting would be "injurious" (DeRaismes Tr. March 6, 102:9-19), Judge Markey's fears were soon realized. Following the majority's decision, the City enacted two successive moratorium ordinances and thereafter, on July 22, 1980, enacted Ordinance No. 4515 which divided the City into two districts, permanently restricting CCC to one-third of the City. (J.A. 69). On September 5, 1980, the District Court preliminarily enjoined enforcement of this new districting scheme on the ground that it violated the First Amendment and was too

[6] "Nor is CCC likely, under the city's plan, ever to speak again outside its present area. The city, after receiving the majority opinion, signaled its intent to impose a second moratorium. In its briefs here it repeated, ad nauseam, that its 90-day moratorium was merely 'a one-time, temporary' delay in CCC's expansion. The city refused, however, to assure Judge Matsch that it would not impose second and continuing moratoriums if he denied the injunction. The city appealed the injunction interlocutorily, and moved to expedite, even though the moratorium expired the day after the injunction issued. Moreover, a failure to impose continuous moratoriums might, as the city elsewhere argues, allow CCC to 'wire the entire city' and thus defeat the city's plan to grant either one monopoly for the entire city, or a number of monopolies, each in a specified district. Hence, the city must either abandon its present plan or it must continue to impose moratoriums on CCC's right to speak outside its present area." (P.A. at A-17).

proprietary to be exempt from the antitrust laws, even under the Tenth Circuit ruling now before this Court. (Opp. Br. at 1a-12a).[6a]

SUMMARY OF ARGUMENT

The Tenth Circuit's decision in this case creates automatic and virtually blanket antitrust immunity for local governments. In essence, the Tenth Circuit held that the antitrust laws only apply when a non-home rule entity is actually engaged in business operations. The Tenth Circuit apparently ruled as it did for several reasons.

First, it reached several conclusions about Colorado state law which must be addressed initially because they underlie much of the Tenth Circuit's immunity analysis. The Tenth Circuit felt that Colorado home rule cites are unique in that only they can adopt laws applicable to matters of purely local concern. From this, the court reasoned that there would be no applicable law at all if the city could not act. To avoid this type of void, the Tenth Circuit concluded that Colorado home rule cities must be sovereigns capable of announcing state policy on their own, since they were the only source of policy under the state constitution. The Tenth Circuit also noted Colorado state cases where home rule cities had adopted laws relating to cable television, and thus concluded that cable television must be a matter of purely local concern, and that Boulder's market allocation plan must be lawful under state law.

These conclusions about Colorado state law are uniformly erroneous. Cable television is not a purely local matter. Even if it were, home rule cities do not have exclusive authority over purely local affairs; the state can also adopt applicable policies, and they will apply to purely local matters if a home rule city declines to supersede the state's policy. Accordingly, there is no policy void; it has been expressly held that home rule cities do not declare state policy. They are not city-states with their own sovereignty for federalism purposes. Lastly, Boulder's actions are not lawful under state law. A recent Colorado case involving a moratorium on a cable television competitor for the purpose of replacing one competitor with another has ruled that such actions are illegal under state law.

[6a] On May 12, 1981, the same Circuit Judges who heard the first appeal, plus Senior District Judge Luther L. Bohanon, sitting by designation, heard oral argument in the Second Appeal. On May 15, 1981, the panel ordered CCC to suspend development work pending a decision, but also left the preliminary injunction in effect.

In addition to its erreonous application of state law, the Tenth Circuit ruled as it did because: (1) it considered "governmental" city actions exempt because *City of Lafayette* is limited to proprietary conduct; and (2) it considered general home rule authority to manage local affairs to be a sufficient statement of state anticompetitive policy under *City of Lafayette* standards.

It is submitted that general grants of authority do not constitute any form of articulated state policy to displace competition, let alone a statement of policy which satisfies *City of Lafayette* standards. In the antitrust realm, the implied state action exemption cases are grounded in federalism, and represent a balance between federalism and important national antitrust goals. This balance does not require antitrust policy to be subordinated to anything less than a true, valid state decision to displace competition in a given market.

In light of the fact that *City of Lafayette* reflects a federalism rationale, it is also submitted that the proprietary-nonproprietary distinction is simply irrelevant to a state action exemption inquiry. The issue is whether a given anticompetitive action reflects clear state policy. Without such a policy mandate, actions by entities other than the state are not exempt from the antitrust laws, regardless of whether they are "proprietary" or "governmental." It is thus apparent that the Tenth Circuit erred when it decided to grant immunity for a local "governmental" act unsupported by any state policy.

Several policy considerations also indicate that broad municipal antitrust immunity should be denied. The "public service" and impairment-of-local-autonomy arguments are erroneous, and have largely been rejected by this Court. In addition, broad immunity would cause severe economic dislocation and pervert federalism by allowing cities to even overrule state procompetitive policy. Confusion would also be created by use of the vague proprietary-governmental distinction, or by use of equally vague distinctions between types of local government, as a basis for determining when antitrust immunity exists. The indications are that *City of Lafayette* generated social benefits through increased competition, and that the problems which concerned the dissent have not materialized. *City of Lafayette*'s standards should thus be retained, and applied in this case to reverse the Tenth Circuit.

ARGUMENT

I.

INTRODUCTION: SCOPE OF APPEAL IS LIMITED.

This appeal is limited in scope. As the Tenth Circuit noted, the issue on appeal "is whether the City is exempt from the antitrust laws." (P.A. at A-2). The Tenth Circuit reversed "as a matter of law" because it concluded that Boulder was immune from antitrust liability under the facts of this case. (P.A. at A-9). Accordingly, this appeal presents a narrow but significant question of law: Whether, on the facts of this case, Boulder is immune from the antitrust laws as a matter of law? Petitioner contends that the Tenth Circuit's affirmative answer to this question is incorrect if the controlling legal standards are properly understood and correctly applied to the facts as found by the trial court.

II.

THE TENTH CIRCUIT'S CREATION OF BROAD MUNICIPAL ANTITRUST IMMUNITY IS NOT JUSTIFIED UNDER STATE ACTION EXEMPTION STANDARDS, OR UNDER THE FACTS OF THIS CASE.

A. Since This Court's Decisions Applying *Parker v. Brown* have Defined the Relevant Legal Standards in Terms of Federalism, A Valid State Policy is Required.

Any discussion of the legal standards relating to state action immunity should begin with the various broad antitrust principles which guide analysis in this area. A threshold principle is that the antitrust laws represent a national pro-competition policy of paramount importance. *City of Lafayette*, 435 U.S. at 398; *United v. Topco Associates*, 405 U.S. 596, 610 (1972). Accordingly, this policy is "the polestar by which all must be guided" when they engage in conduct which impacts on competition. *City of Lafayette*, 435 U.S. at 406. This congressionally mandated free-market policy even prevails over other social goals to the extent that such goals are anticompetitive. *See, e.g., National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978).

In keeping with these guiding principles, this Court has always recognized a "heavy presumption against implicit exemptions" from the antitrust laws. *Goldfarb v. Virginia St. Bar*,

421 U.S. 773, 787 (1975); *City of Lafayette*, 435 U.S. at 398. The message is clear: antitrust policy is a positive feature of our laws, and not some form of limitation to be circumvented if at all possible.

Consistent with the favored role played by the antitrust laws, this Court has only recognized two implied exemptions[7], and then only in situations where it was necessary to do so to accommodate other "overriding" interests. *City of Lafayette*, 435 U.S. at 399-400. However, these two implied antitrust exemptions are applied narrowly and are not extended beyond what is necessary to serve the overriding interest which initially justified the exemption.[8]

This case involves the state action immunity first recognized in *Parker v. Brown*, 317 U.S. 341 (1943). This state action immunity flows from the federal nature of our "dual system of government." *City of Lafayette*, 435 U.S. at 400. Under *Parker's* federalism rationale, the 50 states are entitled to some federal deference in the area of economic policy because they are sovereign in their own right. *See, e.g., Bates v. State Bar of Arizona*, 433 U.S. 350, 361-62 (1977). However, "state action" in the *Parker* sense is much narrower than the state action notion in other contexts.[9] Applying the narrowed federalism concept of *Parker*, this Court has concluded that the proper balance between national antitrust policy and state sovereignty is to enforce the antitrust laws unless a state policy clearly expresses an affirmative decision by the state, acting

[7] *Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965); *Parker v. Brown*, 317 U.S. 341 (1943). These two implied exemptions are discussed in *City of Lafayette*, 435 U.S. at 399-400.

[8] For example, this Court has described the *Parker* holding as "narrow," and confined the state action immunity to governmental acts of the state acting as sovereign. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 590-91 (1976).

[9] A passage from the *Cantor* case is illustrative:

> Unquestionably the term "state action" may be used broadly to encompass individual action supported to some extent by state law or custom. Such a broad use of the term, which is familiar in civil rights litigation, is not, however, what Mr. Chief Justice Stone described in his *Parker* opinion. He carefully selected language which plainly limited the Court's holding to official action taken by state officials. 428 U.S. at 590-91 (footnotes omitted).

governmentally as sovereign, to displace competition. *Bates*, 433 U.S. at 361-62.

This federalism rationale provides the touchstone for evaluating when state action immunity is available to entities other than the state itself acting as sovereign. This touchstone reveals that such entities have no state action immunity of their own, because in the antitrust realm there is simply no federalism-based justification for extending immunity beyond the state itself acting as sovereign. Federal deference is only warranted when there is a clash between true state anticompetitive policy and congressional policy; federalism does not require deference to local anticompetitive policy independently originated by a city.[10] Absent the type of clear state policy which justifies subordination of federal free-market goals, national policy obviously applies, and the thousands of municipalities in this country "must obey the antitrust laws." *City of Lafayette*, 435 U.S. at 416.

This Court has never lost sight of *Parker*'s roots. The state action exemption cases have therefore required *state* policy, and have articulated the kind of state policy which will bring federalism issues into play in the antitrust area. *Goldfarb* reiterates that activity which is not "required by the State acting as sovereign" is not a sufficient expression of state policy to warrant federal deference. 421 U.S. at 790. Therefore, even though the Virginia State Bar was admittedly "acting within [the] broad powers" given to it by the state, *City of Lafayette*, 435 U.S. at 410, and even though its action may have been "prompted" by the state, immunity did not exist because the restraint at issue had not been "compelled by direction of the State acting as sovereign." *Goldfarb*, 421 U.S. at 791.

In *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), this Court reacknowledged *Goldfarb*'s state direction requirement, *id.* at 600, and reiterated that issues of federalism for antitrust purposes only arise if an affirmative policy of the state *qua* state is involved. *Id.* at 591 ("there is no claim that any state action violated the antitrust laws").

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[10] Lower courts have reached the same conclusion about home rule cities: "However 'sovereign' home rule cities . . . may be [under state law], they nonetheless carry the status of municipalities so far as federalism is concerned." *Woolen v. Surtan Taxicabs, Inc.*, 461 F.Supp. 1025, 1032 (N.D. Tex. 1978).

In *Bates*, however, this Court did confront a case where the "claims are against the State." 433 U.S. at 361.[11] The state attorney-advertising restriction involved in *Bates* was found to be "so clearly and affirmatively expressed and . . . the State's supervision . . . so active," that federal deference was deemed necessary to avoid a clash between congressional policy and a particular anticompetitive policy of the state acting as sovereign. *Id.* at 362.

In *City of Lafayette*, this Court confronted municipal anticompetitive action which was taken pursuant to broad general authority from the state to operate a municipal utility. *City of Lafayette* involved a claim by two cities that they were exempt from the antitrust laws under *Parker* by reason of their governmental status alone. Rejecting that claim, this Court again reiterated that antitrust immunity can only arise if the state, acting as sovereign, adopts a specific anticompetitive policy which meets the standards for immunity set forth in *Parker*, and if the state has purposefully decided that it wants to use its local governments as a vehicle for implementing said policy. 435 U.S. at 413. If a city acts pursuant to such state policy, it will not be liable under the antitrust laws. Under such circumstances, however, immunity is consistent with *Parker's* federalism rationale, because it is state rather than local policy which is immunized. In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), this Court repeated that an unequivocal and active *state* anticompetitive policy is a prerequisite to federal deference.

It is this narrowed federalism concept which determines whether a city is exempt from antitrust enforcement. Varying phrases are used in *City of Lafayette* to describe the test for municipal immunity,[12] but when the case is viewed in its

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[11] *Bates* involved an attorney disciplinary rule imposed and enforced by the Arizona Supreme Court, the "ultimate body wielding the State's power over the practice of law." 433 U.S. at 360. Accordingly, the rule expressed statewide policy of the sovereign, not the local policy of a municipality.

[12] The following language is found in the plurality and concurring opinions in *City of Lafayette*:

> The *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign . . . pursuant to a state policy to displace competition with regulation or monopoly public service.

435 U.S. at 413.

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entirety, uniform guidance emerges. Due to the federalism basis of *Parker,* and the importance of our national antitrust policy, antitrust immunity for local governments only exists if the state as sovereign consciously decides to displace competition in a particular market, affirmatively evidences this decision with a substitute economic policy of its own, and expressly allows or requires its municipalities to operate pursuant to such policy. No two authors would use the same words to articulate this standard,[13] but the meaning is clear. If there is no underlying state policy sufficient to qualify for immunity under *Parker,* or if a municipality may nonetheless "express its own preference, rather than that of the State," there is no city exemption from the antitrust laws on the basis of federalism. *City of Lafayette,* 435 U.S. at 414.

B. This Case Involves no State Anticompetitive Policy Whatever: The Tenth Circuit Totally Misapplied the Relevant Legal Standards.

The Court of Appeals below acknowledged that this case involves "City action in the absence of any regulation whatever

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> [M]unicipalities are "exempt" from antitrust enforcement when acting as state agencies implementing state policy to the same extent as the State itself. . . .

Id. at 412 n.42.

> [I]n the absence of evidence that the state authorized or directed a given municipality to act as it did, the actions of a particular city hardly can be found to be pursuant to "the state['s] command," or to be restraints that "the state . . . as sovereign" imposed.

Id. at 414.

> [A]n adequate state mandate for anticompetitive activities of cities . . . exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of. The *Parker* doctrine, so understood, preserves to the States their freedom under our dual system of federalism to use their municipalities to administer state regulatory policies . . . without at the same time permitting purely parochial interests to disrupt the Nation's free-market goals.

Id. at 415-16.

> [*Parker* will not support] a State's desire to insulate anticompetitive practices not imposed by it as an act of government. . . .

Id. at 416.

> [T]he *threshold inquiry* in determining if an anticompetitive activity is [immune] is whether the *activity* is required by the State acting as sovereign. . . . *Id.* at 425 (Burger, C.J., concurring).

[13] In other words, the various passages from *City of Lafayette* quoted above obviously do not constitute separate "tests" which can be played off against one another in an effort to circumvent the antitrust laws.

by the State. . . . [The city policy] here concerned was the only control or actual supervision exercised by state or local government, and it represented the only expression of policy as to the subject matter." (P.A. at A-6 to A-7). Accordingly, absolutely no issue of federalism in the *Parker* or *City of Lafayette* sense was present. When no issue of federalism is present, there is simply no basis for applying *Parker*. Notwithstanding this fact, the Tenth Circuit invoked *Parker* and recognized broad antitrust immunity for local governments under the facts of this case. Significantly, the Tenth Circuit's decision accords Boulder the right to "express its own [anticompetitive] preference" independent of and even in derogation of explicit, procompetitive state policy. This result is "a perversion of federalism." *City of Lafayette*, 435 U.S. at 416.

The Tenth Circuit majority had two alternative grounds for its decision to broadly immunize local governments from the antitrust laws. First, it simply considered *City of Lafayette* inapposite on the ground that *City of Lafayette* allegedly only applies to a city's "proprietary" actions, and that so called "governmental" actions are immune if they satisfy the "*Parker-Midcal* doctrine." (P.A. at A-9). Second, the Tenth Circuit concluded that, even if *City of Lafayette* does apply, the "statement of [state] policy requirement" is met when a state has a home rule provision which authorizes municipalities to manage their own affairs under a home rule charter. (P.A. at A-8). Proper analysis, starting with home rule in Colorado, reveals the manifest error in the Tenth Circuit's decision

C. There is no Clash of State and Federal Law: Application of the Antitrust Laws to Enjoin Anti-Competitive Municipal Conduct in This Case Did Not Void Local Governmental Action Which Otherwise Would Have Been Valid Under Local Law

Despite "the absence of any regulation whatever by the State of Colorado" (P.A. at A-6), the Tenth Circuit majority nonetheless granted state action immunity to the home rule city of Boulder, Colorado. The City apparently argues that it should have immunity of its own because, as a home rule city, it will never be able to take advantage of state policies. This entire argument is based on the proposition, which the Tenth Circuit accepted, that Colorado home rule cities have "*exclusive*

authority as to matters of local concern." *See, e.g.*, Opp. Br. at 18, 24 (emphasis added). In fact, no home rule city—not even a Colorado home rule city—has any form of exclusive authority.

The Tenth Circuit's analysis of Colorado law was, simply, incorrect. Settled Colorado law establishes that only the General Assembly can promulgate state policy and that Colorado's home rule cities are not equated with the state even when acting in matters of purely local concern. The authority of Colorado's home rule cities over local matters is, therefore, not "exclusive."

1. Colorado Law Does Not Regard Each Home Rule City As A Separate, Sovereign State, Capable of Announcing State Policy.

The Tenth Circuit stated that because Colorado's home rule cities derive their authority directly from the state constitution, their authority is not "delegated";[14] thus, they express

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[14] Respondents contend that the powers of Colorado home rule cities are unique in that the powers are derived from the state constitution and grant to home rule cities "exclusive authority as to matters of local concern." (Opp. Br. at 24). This contention is fallacious and misleading on a crucial issue. Colorado home rule powers are similar to those found in many other states. The Tenth Circuit decision would have broad application, particularly where, as here, the state legislature has not articulated any policy to displace competition. Thus, the Panel's reasoning would give antitrust immunity to cities in many other states, including all of the other five states in the Tenth Circuit.

Like Colorado's home rule cities, home rule cities in Arizona, California, Connecticut, Nebraska, New Mexico, Ohio, Oklahoma and Oregon may pass ordinances superseding state legislation on matters of purely municipal concern. *City of Tucson v. Arizona Alpha of Sigma Alpha Epsilon*, 67 Ariz. 330, 195 P.2d 562 (1948); *Sonoma County Organization of Public Employees v. County of Sonoma*, 23 Cal.3d 296, 152 Cal.Reptr. 903, 591 P.2d 1 (1979); *Caulfield v. Noble*, 178 Conn. 81, 420 A.2d 1160 (1979); *City of Omaha v. Lynch*, 181 Neb. 810, 151 N.W.2d 278 (1967); *Apodaca v. Wilson*, 86 N.M. 516, 525 P.2d 876 (1974); *Canada v. Phillips*, 168 Ohio St. 191, 151 N.E.2d 722 (1958); *Lee v. Norick*, 447 P.2d 1015 (Okla. 1968); *Heinig v. City of Milwaukie*, 231 Ore. 473, 373 P.2d 680 (1962).

Respondents have contended that the local autonomy of home rule cities in New Mexico and Oklahoma is restricted and subject to control by the legislatures. (Opp. Br. at 24). The case of *Apodaca v. Wilson, supra*, refutes this contention as to New Mexico. Article X, § 6 of the New Mexico Constitution provides that "[a] municipality which adopts a charter may exercise all legislative powers and perform all functions not expressly denied by general law or charter." The New Mexico Supreme Court held in *Apodaca*

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state policy when exercising their complete authority over local affairs. The Colorado Supreme Court, however, has taken a contrary position. In *City and County of Denver v. Sweet*, 138 Colo. 41, 329 P.2d 441 (1958), the Colorado Supreme Court observed:

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that " 'general law' can only be interpreted to mean a law which applies generally throughout the state, or is of statewide concern as contrasted to 'local' or 'municipal' law" (525 P.2d at 881). Therefore, in all matters of local concern, the city has complete control.

In *Lackey v. Grant*, the Oklahoma Supreme Court interpreted Okla. Const. art. XVIII, § 3(a) to mean that:

> "The people of the state, in the exercise of their sovereign power and by means of organic law, have delegated to the inhabitants of cities having a population of more than 2,000 inhabitants the power to be exercised by such inhabitants at their option to frame a charter for their own local government, which is to become the organic law of such government, and is to supersede the laws of the state in conflict therewith, insofar as they attempt to regulate merely municipal affairs." (116 P. at 915-916).

This view has become established in Oklahoma. *See City of Ponca City v. Edwards*, 460 P.2d 418, 420 (1969). In addition to these powers, California and Arizona home rule cities may legislate on matters of statewide concern as long as the field involved has not been preempted by state legislation. *Bishop v. San Jose*, 1 Cal.3d 56, 81 Cal.Reptr. 465, 460 P.2d 137 (1969) (although case finds preemption); *Tucson v. Arizona Alpha of Sigma Alpha Epsilon*, *supra*. California and Arizona cities may therefore have greater autonomy than Colorado cities.

Similar to the "local" v. "statewide" standard of the above states, fourteen states use a "local law" v. "general law" standard. If the state legislation is applicable only to a particular city, it is "local" or "special" legislation, and the city charter provisions (and city ordinances in eight of these states) will supersede the state legislation. (*Lee v. City of Jesup*, 222 Ga. 530, 150 S.E.2d 836 (1966), *cert denied.*, 386 U.S. 992 (1967); *Hawaii Govt. Employees Ass'n v. County of Maui*, 59 Haw. 65, 576 P.2d 1029 (1978) (holding based upon constitutional provision applying equally to cities and counties); *Bagley v. Gilbert*, 63 Idaho 494, 122 P.2d 227 (1942); *Claffin v. Walsh*, 212 Kan. 1, 509 P.2d 1130 (1973); *State's Atty. v. City of Baltimore*, 274 Md. 597, 337 A.2d 92 (1975); *Birge v. Town of Easton*, 274 Md 635, 337 A.2d 435 (1975); *Board of Appeals of Hanover v. Housing Appeals Com.*, 363 Mass. 339, 294 N.E.2d 393 (1973) (involving general law which did restrict city ordinance); *A.C.E. Equipment v. Erickson*, 277 Minn. 457, 152 N.W.2d 739 (1967); *Inganamort v. Borough of Fort Lee*, 62 N.J. 521, 303 A.2d 298 (1973) (no conflict between statute and ordinance found in this case); *Marro v. General Treasurer of City of Cranston*, 108 R.I. 192, 273 A.2d 660 (1971) (finding statute controlling in this case); *Southern Ry Co. v. City of Knoxville*, 223 Tenn. 90, 442 S.W. 2d 619 *cert. den.* 396 U.S. 1002 (1968); *Lower Colorado River Authority v. City of San Marcos*, 523 S.W.2d 641 (1975); *Wadsworth v. Santaquin City*, 83 Ut. 321, 28 P.2d 161 (1933) (case dealing with "general law" city); *City of Everett v. Fire Fighters, Local #350*, 87 Wn.2d 572, 555 P.2d 418 (1976); Wyo. Const. art. XIII, § 1). If the sta

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"The United States Constitution provides for a national government with a federal system of *states.* Colorado's Enabling Act, approved by the federal government when we acquired statehood, insured that our state will have a republican form of government. Enabling Act, § 4. Clearly our federal system does not envisage as a part thereof city-states. It therefore follows that home rule cities can be only an arm or branch of the state with delegated power. That is the kind of power granted by Article XX." (329 P.2d at 444, 445).

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legislation is uniformly applicable to all cities in a particular class, it will prevail over conflicting city charter provisions and ordinances. These cities would also qualify for immunity under the panel's decision since in the absence of any declared state policy, the home rule city's policy will apply. This independence of local policy was manifested in *Claffin v. Walsh, supra,* where the Kansas Supreme Court declared:

> "No longer are cities dependent upon the state legislature for their authority to determine their local affairs and government. Since home rule cities have power granted directly from the people through the constitution without statutory authorization" (citations omitted) (509 P.2d at 1135).

Also qualifying under the Tenth Circuit's reasoning would be home rule cities in Alaska, Arkansas, Delaware, Illinois, Indiana, Maine, Michigan, Missouri, Montana, New York, South Dakota, Wisconsin, and Puerto Rico. In each of these states (and in Puerto Rico) home rule cities may legislate on any topic relating to municipal affairs in the absence of state legislation on the same topic. *Jefferson v. State,* 527 P.2d 37 (Alas. 1974) (ordinance expressly prohibited by statute in this case); *Rubey v. City of Fairbanks,* 456 P.2d 570 (Alas. 1969); *Beharse v. City of Blytheville,* 254 Ark. 382, 493 S.W.2d 708 (1973); *Gage v. City of Wilmington,* 293 A.2d 555 (Del.Supr. 1972); *City of Urbana v. Houser,* 67 Ill.2d 268, 367 N.E.2d 692 (1977); *City of Bloomington v. Chuckney,* 65 Ind.App. 177, 331 N.E.2d 780 (1975) (but finding here that power specifically denied by statute); *Lewiston Firefighters Ass'n Local 785 v. City of Lewiston,* 354 A.2d 154 (Me. 1976) (although finding preemption here); *Miller v. Fabius Township Bd., St. Joseph County,* 366 Mich. 250, 114 N.W.2d 205 (1962); *St. Louis County v Campbell,* 498 S.W.2d 833 (Mo.App. 1973); *U.S. Mfg. & Distrib. Corp. v. City of Great Falls,* 169 Mt. 298, 546 P.2d 522 (1976); *People v. Cook,* 34 N.Y. 2d 100, 356 N.Y.S.2d 259, 312 N.E.2d 452 (1974); S.D. Const. art. IX, § 2; *Glendale Professional Policemen's Assoc. v. City of Glendale,* 83 Wis.2d 90, 264 N.W.2d 594 (1978); *Cabassa v. Rivera,* 68 P.R.R. 654 (1948). As stated by the Illinois Supreme Court, "[h]ome rule units thus have the same powers as the sovereign except where such powers are limited by the General Assembly." *City of Urbana v. House, supra,* at 694. Presumably the Panel majority would interpret this authority as sufficient to give the city the status of a state in expressing local policy.

The remaining fifteen states may not give cities of any class sufficient local autonomy to qualify for home rule antitrust immunity under the Tenth

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McQuillin is in accord. Relying in part on Colorado authority, his treatise explains:

> "As the people of the state may amend the constitution a state within a state is not created. In other words, a municipality adopting a home rule charter does not become an independent sovereign." 2 E. McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS, § 9.08a at 638 (1979).

The proper view of home rule cities is also found in the early opinion in *City and County of Denver v. Tihen*, 77 Colo. 212, 235 P. 777 (1925), which explained that *only the state legislature may set forth state policy* on a given subject:

> "The Legislature of the state has sole power to say what the public policy of the state shall be. That public policy must be applicable to all portions of the state, and where, as with us, there are home rule or charter cities and towns (as well as those created by general statute), though the former were created after the Exemption Act which was passed, this policy, as no change has been made in the Exemption Act, still applies to all classes of municipalities . . . .
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> "Our General Assembly, by statute, in the exercise of its unquestioned power, is the *only* body competent to say what the public policy of the state shall be, and in it resides the sovereign police power of the statute, independent of constitutional, or common law provisions. That public policy of the state applies to every portion of the state. It is

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Circuit's reasoning, since the courts in those states hold that a city's power are limited to those expressly or impliedly conferred by the state legislature. *Colvin v. Ward*, 189 Ala. 198, 66 So. 98 (1914); *State v. City of Roca*, 172 So.2d 230 (Fla. 1965); *Wilson v. City of Council Bluffs*, 253 Iowa 162, 110 N.W.2d 569 (1961); *Reconstruction Finance Corp. v. City of Richmond*, 249 Ky. 787, 61 S.W.2d 631 (1933); *Bradford v. City of Shreveport*, 263 La. 364, 305 So.2d 487 (1974); *Steitenroth v. Jackson*, 99 Miss. 354, 54 So. 955 (1911); *Ronnow v. City of Las Vegas*, 57 Nev. 332, 65 P.2d 133 (1937); *City of Dover v. Wentworth-Douglas Hosp. Trustees*, 114 N.H. 123, 316 A.2d 183 (1974); *In re Incorporation of Indian Hills*, 280 N.C. 659, 186 S.E.2d 909 (1972); *Litten v. City of Fargo*, ____N.D.____, 294 N.W.2d 628 (1980); *United Tavern Owners of Philadelphia v. School District of Phildelphia*, 441 Pa. 274, 272 A.2d 868 (1971); *Dunbar v. Spartanburg*, 266 S.C. 113, 221 S.E.2d 848 (1976); *Tabler v. Bd. of Supervisors of Fairfax County*, ____Va. ____, 269 S.E.2d 358 (1980); Vt. Stat. Ann. tit. 24 §1971; *Toler v. City of Huntington*, 153 W.Va. 313, 168 S.E.2d 551 (1969).

> just as applicable to the home rule cities now as it was and is to municipalities organized under general statutes." 77 Colo. 212, 235 P. 780, 781.

This authority reveals certain errors in the argument advanced by respondent and the Tenth Circuit. Contrary to their view, the Supreme Court of Colorado has unequivocally held that: (1) home rule cities possess delegated powers and are not independent sovereigns; and, (2) only the Colorado General Assembly may promulgate state policy. Hence, it cannot be said that a home rule city's ordinance on even a matter of purely local concern articulates the state policy of Colorado, and is thus exempt from the antitrust laws under *Midcal.*

The Tenth Circuit's erroneous belief that Colorado law treated home rule cites as separate, independent sovereigns when acting on matters of local concern was compounded by the Court's conclusion that home rule cities had "exclusive" authority over such matters. Since exclusive authority would preclude state legislation on local matters, home rule cities were seen as the only entities which could make local policy. Applied to the antitrust context, this analysis of home rule power led to the conclusion that only home rule cites can articulate the anticompetitive policy required for state-action immunity.

The concern caused by the allegedly exclusive authority of home rule entities is unfounded, because no such exclusive authority exists. Although in *City of Canon City v. Merris,* 137 Colo. 169, 323 P.2d 614, 620 (1958), the Colorado Supreme Court did state that "[a]pplication of state law or municipal ordinance, whichever pertains, is mutually exclusive[,]" it rejected the mutual exclusivity rule in two subsequent cases. First, in *Woolverton v. City and County of Denver,* 146 Colo. 247, 361 P.2d 982 (1961), the court rejected the notion that all matters of legislation could be divided into solely statewide or purely local categories, holding instead that matters of mixed state and local concern existed which may be the subject of coexisting state and local law. While the *Woolverton* court retained the mutual exclusion rule in matters of purely local or strictly statewide interest, this vestige of the mutual exclusion rule was extinguished in *Vela v. People,* 174 Colo. 465, 484 P.2d 1204 (1971). The *Vela* court first held that, under Colorado's

home rule provision, the state may, in fact, legislate on purely local matters if the home rule city does not adopt a conflicting local ordinance (484 P.2d at 1205), and then overruled language in *Merris* and *Woolverton* " which suggests that in strictly local and municipal matters ordinances of home rule cities apply to the exclusion of state statutes." (484 P.2d at 1206). Instead, the court explained that the state statutes are only superseded in the event of a conflict.

This short review of Colorado law illustrates certain errors of state law in the Tenth Circuit's opinion and respondent's argument supporting it. Not only does Colorado law restrict announcements of state policy to the General Assembly, but it is now clear that even as to purely local matters, all a home rule city has to do to avail itself of the benefits of state policy is decline to supersede that policy. This could not be true if home rule cities were independent sovereignties as to matters of local concern.

This review also demonstrates that the Tenth Circuit could not rely on *Manor Vail Condominium Ass'n v. Town of Vail,* 604 P.2d 1168 (1980), to support the proposition that cable television was a matter of purely local concern. Since the demise of the mutual exclusion rule, a limited holding that a particular home rule city's ordinance is valid would not, in the absence of any issue regarding the classification of the subject matter, indicate that the subject matter was, in fact, purely local. The subject matter of cable television could well be of mixed state and local concern. Indeed, in light of this Court's holding in *United States v. Southwestern Cable Co.,* 392 U.S. 157 (1968), that cable television is a medium in interstate commerce (a decision rendered before the advent of satellite technology), municipal control of cable television which is unrelated to the protection of municipal rights of way could hardly be considered a matter of purely local concern.[15]

In fact, in the late 1960s the "local concern" issue was extensively litigated in connection with cable television, and the decisions which followed are totally inconsistent with the Tenth Circuit's "purely local concern" conclusion. See, e.g., *General Telephone Co. of the Southwest v. United States,* 449 F.2d 846,

[15] In *TV Pix, Inc. v. Taylor,* 304 F. Supp. 459 (D. Nev.) 1968, *aff'd per curiam,* 396 U.S. 556 (1970), the Court, while noting various local incidents of cable television in the pre-satellite era, was, in fact, upholding *state* regulation of cable television.

853-59 (5th Cir. 1971). In these early cases, telephone companies argued that they could construct cable television facilities for local lease-back without a certificate of convenience and necessity, since cable television was an intrastate activity over which the F.C.C. had no jurisdiction. These arguments were rejected, and F.C.C. jurisdiction has been recognized. *Id.* Accordingly, since cable television is not even of solely intrastate concern, it is obviously not of "purely local concern." *California Interstate Telephone Co. v. F.C.C.*, 328 F.2d 556 (D.C. Cir. 1964) (point-to-point distribution by satellite within state is nonetheless foreign commerce). Colorado law is in accord. *Re The Mountain States Telephone & Telegraph Co.*, 73 P.U.R. 3d 161 (Colo. Pub. Util. Comm. 1968) (P.A. at A-77).

Even assuming, *arguendo*, that cable television in Colorado is purely a matter of local concern, the Colorado authorities cited above reveal that a home rule city's policy on cable television is at most municipal, not *state* policy. They also disclose that, even under such circumstances, a home rule city would not be precluded from taking advantage of state policy to displace competition in the cable television market. They are thus not disadvantaged in any way, and, like everyone else, must await direction from the state in the area of anticompetitive policy.

2. Colorado Courts Have Not Validated the Type of Action Under Review.

Another apparent reason for the Tenth Circuit's decision is its belief that the trial court had invalidated the very type of municipal control validated in the *Manor Vail* case, thus raising a conflict between the antitrust laws and municipal action valid under state law. Again, the Tenth Circuit's analysis missed the mark. First, all local regulation of cable television was not invalidated by the District Court. The trial judge limited his concern to anticompetitive conduct, and no policy of the law is offended by subordinating municipal anticompetitive policy to the Sherman Act. Second, *Manor Vail*, which only involved a subscriber's equal protection challenge to a rate classification differentiating between hotels and condominiums, cannot be read to support Boulder's action.

Finally, two opinions by Colorado state district court judges indicate that respondent has exceeded the bounds of municipal conduct permitted home rule cities. On February 4,

1980, the City sought a temporary restraining order in state district court (*The City of Boulder, Colorado v. Community Commnications Co., Inc.*, (Boulder Dist. Ct. Action No. 80-CV-0198-1)). Although the court pointed to the existence of a pending federal complaint in denying injunctive relief, the court noted that the City had failed to present "satisfactory evidence or legal argument" demonstrating that it would ultimately prevail and, second, that based on CCC's investment and the presence of "significant First Amendment issues",... the equities are balanced in favor of CCC." (Ex. 20, 5, 6; Tr. March 4, 170:21)

Of similar import is a recent decision by the Weld County District Court in *City of Greeley v. Greeley Video, Inc.* (No. 80-CV-270, January 30, 1981). See Appendix to this Brief ("B.A." herein). A home rule city, Greeley, adopted an ordinance in 1968 requiring any person who sought to operate a cable system in the city to first secure a non-exclusive, revocable permit. Although Greeley Video received a permit in January, 1968, delays in FCC approval and economic factors precluded the company from obtaining distant signals, and delays in construction continued even past the advent of satellite technology. As a result, no construction had been undertaken by July, 1979. In that month, the City Council decided to review Greeley Video's license and enacted a moratorium on construction which took effect in August, 1979, and lasted for seven months. During the moratorium, the City engaged in a solicitation process in which companies competed for the market. In that competition Greeley Video placed second to Storer, which was selected by the City Council as *the* cable TV operator for Greeley. Notwithstanding its second place finish, Greeley Video asserted its right to construct a system pursuant to its non-exclusive permit. In response, the City Council found that the company had violated conditions of the permit, and revoked the company's permit. The company thus brought suit.

Notwithstanding the revocable nature of the permit, the state court noted that the City Council was not permitted to revoke arbitrarily. Applying that standard to the City's action, the court held that the City's desire to replace Greeley Video with another cable TV operator was not a valid reason for revoking Greeley Video's permit, particularly in light of the requirement that permits be non-exclusive in character:

"These facts, and [the] record as a whole, lead this court inescapably to the conclusion that the real reason for the revocation of the Greeley Video permit was not the commission of the defaults and violations considered at the hearing, but rather the desire of the Council to carry out its resolution selecting 'Storer Cable TV as the cable TV operator for Greeley.'

"The court in no way impugns the motive of the members of the City Council. . . .

"But Chapter 7A of the Greeley Code of Ordinances does not establish an exclusive license system. The permits under that chapter are specifically stated to be non-exclusive and the city has reserved the right to grant similar permits to others. Thus, the revocation of the permit of Greeley Video is not necessary to enable Storer Cable TV to be *a* cable TV operator in Greeley, as envisioned by Chapter 7A of the ordinances. It would, of course, be necessary to enable Storer Cable TV to be *the* cable TV operator for Greeley.

* * *

"The City Council may believe that under present circumstances a competitive system is not feasible for cable TV in the City of Greeley. If so, its recourse is to alter the ordinance. [Citation omitted.] It may be noted, however, that non-exclusive arrangements in local cable TV franchising are recommended by some authorities as a method of assuring continued technical improvements. [Citation omitted.] (B.A. at BA-10 to BA-11)(emphasis in original).

Judge Matsch's opinion below did not therefore directly conflict or interefere with the ability of Colorado cities to regulate cable television, notwithstanding the assertions to the contrary by the Tenth Circuit. Like its counterpart in Greeley, the Boulder City Council possessed the authority to grant additional permits whenever it desired. While the Federal District Court focused its concern on the federal antitrust laws, and was only objecting to anticompetitive conduct by the City, the opinions by the state district court in Greeley and Judge Neighbors in Boulder indicate that where non-exclusive permit provisions exist, as in Boulder, no tension exists between federal antitrust laws and Colorado common law.

D. Even if a Home Rule Provision is Viewed as a State Policy, There is no State Mandate for Anticompetitive Conduct Associated with Said Policy.

Although the Tenth Circuit apparently misapplied state law to conclude that home rule entities are independent sovereigns entitled to their own state action immunity, it realized that a true state policy would have to be identified if its recognition of city-action immunity was incorrect. In looking for such a state policy, the Tenth Circuit again adverted to respondent's home rule status to conclude that a general grant of home rule authority satisfied "the statement of [state] policy requirement in *Lafayette.*" (P.A. at A-8). This conclusion is incorrect. General grants of authority clearly do not meet *City of Lafayette* standards. This point can be confirmed quickly by asking if the "grant of authority" in question will allow the grantee to "express its own preference, rather than that of the State." 435 U.S. at 414. If so, then *City of Lafayette*'s federalism-based standards are not met. General grants of authority—and few are as general as the home rule provision at issue—obviously allow the grantee to do as it wishes in terms of policy. Indeed, the respondent has repeatedly emphasized that it can even override state policy if it wishes. (Opp. Br. at 23-24). Such unbridled city authority to "express its own" policy preference can never meet *City of Lafayette* standards.

In response to the unavoidable rule that general grants of undifferentiated authority do not satisfy *City of Lafayette* standards, the respondent City has often sought refuge in the following passage from *City of Lafayette:*

> "This does not mean, however, that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense to an antitrust suit . . . . [W]e agree with the [Fifth Circuit] Court of Appeals that an adequate state mandate for anticompetitive activities of cities . . . exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.' " (Opp. Br. at 17).

However, as already demonstrated, the different words used in *City of Lafayette* (e.g., "directed," "required," "authorized," "contemplated," "imposed," etc.) do not signal separate "tests"

for immunity. Moreover, the "contemplation" language which was borrowed from the Fifth Circuit cannot mean that general state grants of authority create immunity under the reasoning of *Parker*.[16]

The decisions by this and other courts uniformly confirm that true state direction with regard to competition in a particular market, rather than general grants of authority, is required before concern for federalism comes into play. For instance, in *Goldfarb, supra,* a "state agency" was granted general authority by the State to regulate the legal profession. And, "though acting within its broad powers," the State Bar was denied *Parker* immunity because it was "not executing the mandate of the State." *City of Lafayette, supra,* 435 U.S. at 410. Therefore, broad grants of unspecified authority by the state do not satisfy the requirement that immunity be based on a clear state policy to displace competition in a particular area.[17]

Even *City of Lafayette* illustrates the error of the respondent's "general authority" argument. If this Court accepted the argument that respondent is immune because general authority contemplates all forms of anticompetitive conduct, then *City of*

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[16] The Fifth Circuit itself has confirmed this in *United States v. Texas State Board of Public Accountancy,* 592 F.2d 919, 920 (5th Cir. 1979), *cert. denied,* 444 U.S. 832 (1980).

[17] There are numerous lower court decisions confirming this point. See, e.g., *Corey v. Look,* 641 F.2d 32 (1st. Cir. 1981) (general authority to operate parking facilities does not authorize anticompetitive operations); *United States v. Texas State Board of Public Accountancy,* 592 F.2d 919, 920 (5th Cir. (1979), *cert. denied,* 444 U.S. 832 (1980) ("the connection between this granted power and the Board's use of it is too tenuous to permit the conclusion that the legislature intended its scope of activity to encompass an anti-competitive regulation"); *Feminist Women's Health Center, Inc. v. Mohammad,* 586 F.2d 530, 550 (5th Cir. 1978), *cert. denied,* 444 U.S. 924 (1980) (Director of Florida Board of Medical Examiners was not acting within the intended scope of his statutory authority by pressuring doctors to cease practice, absent unethical or illegal conduct by doctors); *Duke & Co. v. Foerster,* 521 F.2d 1277, 1281 (3d Cir. 1975) (statutory authority to establish and operate airport, auditorium, and stadium did not express policy to boycott certain suppliers); *Grendel's Den, Inc. v. Goodwin,* 495 F.Supp. 761, 769 (D. Mass. 1980), aff'd, 1981-1 Trade Cas. ¶ 63978 (1st Cir. 1981) (statute granting church and school officials veto power over liquor license applications did not express anticompetitive policy); *Guthrie Aircraft, Inc. v. Genessee County,* 494 F.Supp. 950, 956 (W.D.N.Y. 1980) (statutory authority to establish and operate airport did not express policy to revoke license of fixed base operator and grant monopoly license to competitor); *Mason City Center Associates v. City of Mason City, Iowa,* 468 F.Supp. 737, 742 (N.D. Iowa 1979) (general authority to zone did not express anticompetitive policy).

Lafayette itself would have to be reversed. As one District Court has pointed out, "the city [of Lafayette] has general authority to operate a public utility. What it lacked was the specific authority to engage in . . . anticompetitive operations." *In Re Airport Car Rental Antitrust Litigation,* 474 F.Supp. 1072, 1096 (N.D. Cal. 1979) (involving, *inter alia,* the Colorado home rule City of Denver).

The very language from *City of Lafayette* quoted by respondent also confirms that this Court has not endorsed immunity for isolated local policies developed under general grants of authority. As the passage makes clear, a "*state mandate*" is what is required, and such a mandate is not present if it is not apparent "from the authority given to operate in a particular area, that the legislature contemplated the kind of action complained of." These words relate to an actual *state* decision to authorize a specific *kind* of action in a *particular* area. Such a standard would exclude cities expressing their own preference, but allow for federal deference to true anticompetitive policies adopted as an act of government by the state as sovereign. Since the respondent city has simply inverted the plain meaning of the Court's language, its effort to immunize all anticompetitive actions taken pursuant to broad grants of general home rule authority should be rejected.[18] By definition, home rule cities declare only municipal, not state, policy.[19]

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[18] Assuming, *arguendo,* that some general state policy is identified, it is nonetheless clear that the state has not directed or authorized any particular type of anticompetitive actions under such policy. Even under the relaxed "state contemplation" test advanced by the respondent, (Opp. Br. at 16-19), antitrust immunity does not exist under the facts of this case. The Colorado Legislature has never explicitly contemplated restraints on cable television competition. Cable television is not among the eight enumerated powers in the Home Rule Amendment. Colo. Const. art. XX, Section 6, nor is there any explicit reference in the Home Rule Amendment to any anti-competitive municipal conduct related to cable television. Outside of the enumerated powers, the Home Rule Amendment is such a broad mandate that it contemplates nothing with particularity. The City engages in *reductio ad absurdum* if it argues that by contemplating nothing specifically, the Home Rule Amendment contemplated all. Lower courts have been unwilling to infer from such a broad mandate an intent to immunize particular acts from antitrust scrutiny. *See, e.g., Hahn v. Oregon Physician's Serv.,* 508 F.Supp. 970, 976 (D.Ore. 1981) ("To be entitled to state action immunity, the state's anticompetitive policy must be affirmative, not passive or inferential").

[19] Moreover, it is self-evident that the prerequisite governmental mandate must be expressive of a *valid* state policy. Since a state policy and mandate which violates First Amendment guarantees is obviously invalid,

(footnote continued on following page)

E. The Proprietary-Nonproprietary Distinction Has No Logical Relevance to State Action Immunity Issues Under *Parker*.

In addition to the two-fold manner in which Boulder's home rule status influenced the Tenth Circuit's decision, the Tenth Circuit alternatively relied on the proprietary-nonproprietary distinction to reach its decision.[20] The Tenth Circuit held that *City of Lafayette* only applied to cases where a city is in the business at issue, and then concluded that all other forms of municipal conduct are "governmental" actions entitled to blanket antitrust immunity. In fact, Boulder's actions in this case are clearly proprietary under state law.[21] However, analysis of the federalism rationale behind *Parker* reveals that the Tenth Circuit's decision to exempt all "governmental" acts by cities is unsupportable regardless of how municipal conduct is characterized.

(footnote continued from preceding page)
such a policy could never form a lawful basis for an antitrust exemption. All parties to this action concede that CCC is engaged in First Amendment activity. (*See, e.g.*, Kerner depo. at 186-88; Westdyke depo. at 69). Given the violations of CCC's First Amendment rights (P.A. at A-14 to A-22), this case presents no valid governmental policy on which to base antitrust immunity. Not even Congress could impose an anticompetitive scheme which violates the First Amendment.

[20] To the extent that the Tenth Circuit's blanket immunization of "nonproprietary" (or "governmental") municipal activity is based on the concurrence by the Chief Justice in *City of Lafayette*, it is submitted that the Court of Appeals read too much into said concurrence. *See* Petition for Writ of Certiorari, at 15-18. Saying that cities engaged in actual "business activity" cannot restrain trade in the relevant market in the absence of clear state direction obviously does not suggest that blanket immunity exists in all other situations. *See* 435 U.S. at 425.

[21] Under Colorado law, it is well-settled that the enactment and enforcement of municipal ordinances like those at issue are exercises of proprietary conduct for two reasons: (1) the ordinances involve access to the city's rights of way; and (2) the ordinances involve the procurement of a service for the citizenry. The Boulder ordinances, by their terms, revoked a prior ordinance granting petitioner the right to use city streets and rights-of-way for stringing cable, and then granted petitioner the same rights subject to geographical restriction.

> "The granting of the right by the city to a public service corporation to use the streets of the municipality, or the granting by the General Assembly to such a corporation of the right to use the highways of the state, is the exertion of the proprietary power of the sovereign."

City & County of Denver v. Mountain States Telephone & Telegraph Co., 67 Colo. 225, 230, 184 P. 604, 607 (1919), *overruled on other grounds, People v. Mountain States Telephone & Telegraph Co.*, 125 Colo. 167, 243 P.2d 397 (1952); see also J. BANKS, COLORADO LAW OF CITIES & COUNTIES Section 2.8, at 35 (3d ed. 1979); 2 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS, Section 4.154, at 231 (3d ed. 1979); *Perl-Mack Enterprises Co. v. City & County of Denver*, 194 Colo. 4, 9, 568 P.2d 468, 472 (1977).

This Court's decisions applying *Parker* hold that certain types of affirmative policy decisions by the 50 states are entitled to deference in our federal system. Assuming that the other *Parker* standards are met,[22] the source of a given policy determines whether it is exempt from the antitrust laws. If the state itself is not the source, there cannot be state action immunity under the logic of *Parker*, regardless of whether the challenged activity is "governmental" or "proprietary."

This reveals the obvious: the proprietary-nonproprietary distinction cannot in any way aid an inquiry into whether a state policy exists, or aid an inquiry into whether that policy rises to the stature necessary to warrant federal deference. The distinction thus has no conceptual relevance to the federalism inquiry which controls state action immunity issues. This is evidently why *City of Lafayette*—while admittedly involving municipal conduct traditionally viewed as proprietary—nonetheless refers to *Parker*'s roots in federalism, and announces broad principles applicable in either the "proprietary" or "governmental" contexts. For the purposes of federalism, in other words, it makes no difference whether city policy is "governmental" or "proprietary," since the determinative factor is whether the policy to be immunized is a *state* policy. "Cities are not themselves sovereign; they do not receive all the federal deference of the State that creates them." *City of Lafayette*, 435 U.S. at 412.

By exempting municipal conduct because it is "governmental" rather than because it reflects state policy entitled to federal deference, the Tenth Circuit has, in reality, created a third, new implied immunity from the antitrust laws. Under This new governmental-acts-in-the-absence-of-state-policy immunity, local governments will be fully immunized simply by virtue of their status as local governments, unless they are "in the business" at issue. (P.A. at A-6). This amounts to automatic immunity for local governments in virtually all their dealings. Such wholesale exclusions of parochial anticompetitive policies from antitrust coverage is exactly what *City of Lafayette* disapproved. 435 U.S. at 408.

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[22] Even when a state is the source of an anticompetitive policy, there is no antitrust exemption if the policy is not an affirmatively expressed and clearly articulated act of government by the state as sovereign. *See, e.g., California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

The Tenth Circuit's new local governmental acts immunity is not supported by the reasoning of any of this Court's antitrust immunity cases.[23] It is also extremely ill-advised as a matter of policy, as explained in the following sections. This Court should thus decline what amounts to an invitation to carve out a vast new implied immunity for the "governmental" acts of entities other than the state itself.

III.

POLICY CONSIDERATIONS MILITATE AGAINST BROAD MUNICIPAL ANTITRUST IMMUNITY

Through *Parker* and its progeny, this Court has developed a federalism basis for exempting some forms of clear state policy from the antitrust laws. As thus articulated, this federalism policy lends no logical support to the Tenth Circuit's recognition of implied municipal antitrust immunity for "governmental" acts and home rule policies. It is thus submitted that other policy considerations motivated the Court of Appeals to create what are, in reality, two new implied exemptions from the antitrust laws. For instance, the Tenth Circuit seemed to believe that (1) governmental actions in general are innocuous because they are for the public good; and (2) state ability to delegate authority will be impaired if local governments are not exempt from antitrust compliance. Such policy considerations are not new: they were both raised and specifically rejected in *City of Lafayette*. As explained below, they should also be rejected in this case because they lack merit in their own right and, in any event, are inadequate to justify municipal antitrust immunity because they do not outweigh important counterveiling policies.

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[23] The Tenth Circuit's use of the proprietary-nonproprietary distinction in the State action context should also be rejected because the distinction is widely acknowledged to be incapable of uniform application. As the dissent in *City of Lafayette* observed: "The distinction between "proprietary" and "governmental" activities has aptly been described as a "quagmire." The "distinctions [are] so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation." 435 U.S. at 433 (citiations omitted); *See* also 2 E. McQUILLIN, LAW OF MUNICIPAL CORPORATIONS, §10.05, at 743 (3d ed. 1979).

A. The Fact That Actions By A City May Be In The Public Interest As The City Sees It Does Not Justify Violation Of The Antitrust Laws

Implicit in the notion of municipal antitrust immunity is the argument that local governments should be allowed to restrain trade because they are not motivated by private business considerations, but only by a desire to serve the public interest. This "public service" argument is without merit in both the proprietary and governmental realms. It was flatly rejected by this Court in *City of Lafayette,* a so-called proprietary fact situation. 435 U.S. at 405-06. The very same reasons apply in connection with the Tenth Circuit's broad immunity for home rule entities, since the proposed home rule exemption is not confined in any way to the governmental actions of a home rule city.

The public service argument also fails to justify any form of municipal "governmental acts" immunity. First, the cases show that cities not "in the business" are still capable of anticompetitive action which serves narrow private interests rather than broader social goals.[24] Second, even when there is a public service motivation, the mandates of *National Society of Professional Engineers v. United States,* 435 U.S. 679 (1978), operate to deny local governmental immunity.

In essence, the public service argument is a separate policy argument grounded on the belief that government can be trusted, rather than on the overriding interest of federalism as defined by the decisions of this Court applying *Parker.* The advocates of the public service argument contend that local governments can often identify anticompetitive policies which

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[24] In addition to the instant case, *see, e.g., Corey v. Look,* 641 F.2d 32 (1st Cir. 1981) (a town allegedly gave favored treatment to plaintiff's competitor and drove plaintiff out of parking lot business); *Kurek v. Pleasure Driveway & Park District of Peoria, Illinois,* 557 F.2d 580 (7th Cir. 1977), vacated & remanded, 435 U.S. 992, *aff'd per curiam* on remand, 583 F.2d 378 (7th Cir.), *cert. denied,* 439 U.S. 1090 (1978) (park district allegedly conspired with one concessionaire to coerce other concessionaires to raise and fix prices, and to exclude those concessionaires refusing to be so coerced); *In re Airport Car Rental Antitrust Litigation,* 474 F.Supp. 1072 (N.D. Cal. 1979) (various cities prohibit competitor car rental firms from competing for airport patrons); *Woolen v. Surtran Taxicabs, Inc.,* 461 F.Supp. 1025 (W.D. Tex. 1978) (two cities give one taxi company exclusive right to serve airport); *Guthrie Aircraft, Inc. v. Genesee County,* 494 F.Supp. 950 (W.D.N.Y. 1980) (county allegedly conspired with plaintiff's competitor to prevent plaintiff from competing for county airport business).

will be better for society than Congress' pro-competition policy. It is thus argued that local governments should be allowed to substitute their judgment for that of Congress in such situations.

This argument is conceptually identical to the argument that was made and rejected in *National Society of Professional Engineers.* As this Court observed in *National Society,* Congress has made a controlling policy determination favoring competition, and that policy cannot be overruled by those who feel that competition in a given situation is not in the best public interest. 435 U.S. at 692-94. Efforts to justify deviations from our national pro-competition policy on the ground that other socially desirable consequences will ensue "is nothing less than a frontal assault on the basic policy of the Sherman Act." *Id.* at 695. No matter how well-intentioned, such assaults have never been countenanced, given the preeminent importance of the antitrust policy.

By definition, a local government only needs antitrust immunity for governmental acts when it wants to advance some social goal other than competition. By definition, therefore, the public service argument will always run afoul of *National Society of Professional Engineers.* The legality of a restraint is determined by focusing "directly on the challenged restraint's impact on competitive conditions," and not on other policy justifications. 435 U.S. at 688. This reveals that the public service argument is not really an immunity argument at all; it is an effort to persuade the courts of the reasonableness of the anticompetitive economic or social policies local governments adopt. "That kind of argument is properly addressed to Congress," but not to the courts.[25] *Id.* at 689.

The fact that this Court has recognized an implied exemption for the public service policies of states does not lead to a different conclusion. Clear state anticompetitive policies are not exempt because they are considered preferable to congressional antitrust policy; they are exempt from the antitrust laws under a narrow federalism rationale. *See City of Lafayette,* 435 U.S. at 407 n.33. Since parochial municipal policies are not entitled to such federal deference under the reasoning of this Court's state action decisions, immunity does not exist at all.

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[25] This reveals that the concept of blanket municipal immunity also suffers from overbreadth. Any effort to have Congress create a new antitrust exemption would require articulation of the particular area in which displacement of competition is desired, and not simply a request for broad immunity for any type of anticompetitive arrangement local governments might devise.

B. Local Governmental Autonomy Is In No Way Impaired By Having To Obey The Antitrust Laws

Supporters of municipal antitrust immunity have also argued that denial of immunity will impair local governmental autonomy and hamper the states' ability to efficiently delegate authority to their political subdivisions. See 435 U.S. at 434-35 (Stewart, J., dissenting). Although it is questionable that such ulterior policy considerations could circumvent the rule of *National Society of Professional Engineers*, it is apparent in any event that the concern about hampering state and local governmental operations is unfounded.

Under this Court's state action exemption cases, local governments are as free as they ever were to receive delegated authority and even autonomy from the state. It is true that they must obey the antitrust laws while they exercise their municipal powers, but this does not mean that they have less political autonomy.

The dissenting opinion in *City of Lafayette*, of course, summarized a different viewpoint. The dissent states that *City of Lafayette*, "by demanding extensive legislative control over municipal action, will necessarily diminish the extent to which a State can share its power with autonomous local governmental bodies." 435 U.S. at 435. It is submitted that the dissent's concern is misplaced, because *City of Lafayette* did not "demand" any form of legislative control over municipal action, or create a situation where such control cannot be avoided. *City of Lafayette* requires municipal obedience to the antitrust laws in the absence of sufficient state direction, and that is all. This hardly means that *City of Lafayette* will affect the normal relationships between state and local governments.

For example, in all areas not involving anticompetitive policies, *City of Lafayette* will have no impact whatsoever. Moreover, local governments have no autonomy to restrain trade, any more than they have autonomy to violate the Civil Rights Act or other laws.[26] Therefore, the state's power to use local government as it sees fit—within the limits of the law—is unaffected by *City of Lafayette*. If anything, this Court has allowed a more flexible use of local governments in the antitrust area, since a state can even use its municipalities to implement

[26] *See, e.g., Owen v. City of Independence*, 445 U.S. 662, 639 (1980).

anticompetitive policies if it satisfies *City of Lafayette* standards. Given the significance of the antitrust policies, and the limited nature of the implied state action immunity, this Court's accommodation of state anticompetitive preferences would appear to be quite generous.

Proponents of the impairment-of-autonomy argument apparently believe that requiring municipal conformity to the antitrust laws will force cities to "obtain approval of each law from the legislature." 435 U.S. at 435. One problem with this view is the way it is expressed. By using the word "approval," it assumes that local government should have an active role in originating anticompetitive policy, and that this role will be complicated if state endorsement is required. However, local government has no such role. Competition is the controlling policy goal, and local governments must honor this goal. Only states can originate anticompetitive policy; and they are not allowed to do so because their policies are better, but because only states have the type of sovereign status which triggers federal deference in the *Parker* sense.[27]

The argument that *City of Lafayette* complicates government because it requires "approval of each law" is also overstated. Since the need for such "approval" will only arise when a local government wants to restrain trade, the need should rarely arise if municipalities embrace the goals of the Sherman Act as they should. Under *City of Lafayette,* local government discretion is only restricted to the extent that anticompetitive conduct is contemplated. Even in that context, a city can act if the state has so directed. States are perfectly capable of giving such direction in those areas where *they* decide competition should be displaced.[28] Therefore, *City of Lafayette* will not destroy the efficacy of local government, but it will advance national antitrust policy.

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[27] The belief that local government should be allowed to originate restraining policy is, therefore, just a variation of the public service argument. As discussed above, this Court has properly rejected the public service argument. Once federalism is accommodated by allowing states to implement clear anticompetitive policies which they themselves originate, antitrust policy should not be expected to give way any further.

[28] *See, e.g., New Motor Vehicle Board of California v. Orrin W. Fox. Co.,* 439 U.S. 96, 109 (1978); *Shrader v. Horton,* 471 F.Supp. 1236, 1242 (W.D. Va. 1979), aff'd *per curiam,* 626 F.2d 1163 (4th Cir. 1980).

C. The Tenth Circuit's Analysis Impermissibly Allows Home Rule Governments to Adopt Anticompetitive Local Policy Even in Defiance of Contrary Procompetitive Policy by the State and National Governments

In addition to the inherent flaws of the pro-immunity arguments discussed above, there are several counterveiling policies which support the *City of Lafayette* standard. For instance, the Tenth Circuit noted that home rule local governments in Colorado can "supersede a state statute as to matters of purely local concern." (P.A. at A-5 to A-6). Therefore, while this case involved no state policy "whatever," the Tenth Circuit fashioned a rule which will immunize many home rule anticompetitive policies even where a conflicting state policy exists, since city ordinances supersede if they relate to purely local concerns. There is no reason based in federalism to defer to a city policy which the state itself opposes or declines to endorse, and automatic immunity for home rule entities is thus unjustified.

D. Broad Antitrust Immunity for Local Governments Would Entail Unacceptable Impairments of Our National Free-Market Policy

The respondent intimates that the immunity it seeks would not lead to the type of "highly predatory conduct" involved in *City of Lafayette*. (Opp. Br. at 20). The City's position, which the Tenth Circuit evidently adopted, does not withstand scrutiny. The broad immunity recognized by the Tenth Circuit cannot be confined solely to the facts of this case. Under the Tenth Circuit's ruling, the City of Lafayette itself could presumably have engaged in the "highly predatory conduct" of that case if it had been a home rule city. In reality, therefore, the respondent position would clear the way for predatory municipal conduct by home rule entities, even if the City of Boulder feels it would never engage in such behavior itself.[29]

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[29] In fact, though, Boulder's market allocation scheme is a *per se* violation. *See, e.g., Woolen v. Surtran Taxicabs, Inc.*, 461 F.Supp. 1025 (N.D. Tex. 1978) (exclusive market allocation to one private company by joint venture of two cities). This case involves a blatant scheme to allocate customers and territory among horizontal competitors. Such market allocations are traditionally viewed as *per se* violations of the antitrust laws. *United States v. Topco Associates*, 405 U.S. 596 (1972). The Tenth Circuit's confusion may be due to a suspicion that cable television is really like a monopoly public utility service. Cable television, however, involves competitive markets and is not a public utility. See, e.g., *Television Transmissions, Inc. v. Public Utilities Comm'n*, 47 Cal.2d 82, 310 P.2d 862 (1956) (First Amendment speakers should not be viewed as public utilities); P.A. at A-70 to A-91.

Moreover, predatory conduct and *per se* violations are not confined to situations where a city is in the business at issue,[30] or to home rule entities.[31] It is also clear that violations of the Rule of Reason would be serious deviations from antitrust policy, regardless of the status of the entity involved in the transgression.

These numerous threats to the integrity of congressional antitrust policy are compounded by the fact that local governments are capable of a wide variety of restraining activities. The cases report that local governments are increasingly active in the realm of economic regulation (even when cities do not actually become business competitors), and that they often use their authority to extensively control or even eliminate competition in normally competitive markets.[32] Accordingly, immunizing so-called "governmental" actions would seriously imperil the effectiveness of the antitrust laws, especially considering the large number of actions which would be considered governmental under the Tenth Circuit's reasoning. A broad antitrust exemption for home rule entities would involve even greater gaps in antitrust enforcement.

These local departures from the antitrust laws would also be more alarming than federal deference to state policies for two reasons. First, in terms of sheer numbers they would far exceed state restraints on trade, even though no *Parker* type federalism rationale is available to justify exemptions of independent municipal policies. Second, state anticompetitive policies at least reflect coherent statewide alternatives to the antitrust laws, whereas local schemes would likely reflect a welter of piecemeal, inconsistent efforts to serve parochial

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[30] In addition to the instant case, *see, e.g., Corey v. Look*, 641 F.2d 32 (1st Cir. 1981) (city restraints on parking lot competition); *Duke & Co. v. Foerster*, 521 F.2d 1277 (3rd Cir. 1975) (city and county restrictions on certain brands of beer); *Guthrie Aircraft, Inc. v. Genesee County*, 494 F.Supp. 950 (W.D.N.Y. 1980) (county restrictions on charter air service); *Pinehearst Airlines, Inc. v. Resort Air Services, Inc.*, 476 F.Supp. 543 (M.D.N.C. 1979) (same as Genesee County); *In re Airport Car Rental Antitrust Litigation*, 474 F.Supp. 1072 (N.D. Cal. 1979) (city restrictions on car rental competition at airports); *Mason City Center Associates v. City of Mason City*, 468 F.Supp. 737 (N.D. Iowa 1979) (use of zoning law to prevent shopping center competition); *Woolen v. Surtran Taxicabs, Inc.*, 461 F.Supp. 1025 (N.D. Tex. 1978) (city restriction of taxicab competition at airport).

[31] See *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

[32] See the authorities cited at footnote 30, *supra.*

interests at the expense of wider concerns. The harm to antitrust goals would therefore be too great to justify automatic municipal immunity. Since no true *state* anticompetitive goal will be impaired by denying municipal immunity in the absence of a state mandate, it is submitted that federalism will not be offended by upholding the standards of *City of Lafayette.*

E. Basing Antitrust Exemptions on Distinctions In Municipal Status Will Lead to Confusion and Excessive Immunization

Any attempt to use the status of a local government as a basis for allocating implied antitrust immunity will prove unworkable given the myriad of different types of local governments in this country. The various distinctions set forth in respondent's Opposition to the Petition for Certiorari (Opp. Br. at 24-25) just hints at the problem. Although impossible to say with certainty given the shifting factors involved,[33] the chart in the Appendix to this Brief attempts to summarize the powers of cities in the various states, and illustrates that there is no neat distinction between "home rule" cities and other cities. Since only the class of cities with the greatest local autonomy is represented for each state on the chart, it should not be inferred that cities with less local autonomy than those represented would not also qualify for immunity under the Tenth Circuit's reasoning. Moreover, some states have home rule counties which might also qualify for immunity.[34]

The chart distinguishes between three different sources of authority: (1) directly and expressly from the state constitution; (2) from the state legislature or general assembly where the state constitution directs the legislature to provide for municipal powers; and (3) from the state legislature alone, as where the state constitution provides that cities may be incorporated but mentions nothing about the legislature granting them power.

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[33] For instance, powers vary depending on whether a matter is of "local" or "statewide" concern, whether a law is "general" or "special," and so forth. The varying definitions given by state courts to such words are familiar obstacles to clarity in this area. *See, e.g.,* 2 E. McQUILLIN, LAW OF MUNICIPAL CORPORATIONS, § 4.85 (3d ed. 1979).

[34] *See, e.g.,* Cal. Const. art. XI, §§ 1, 4. Haw. Const. art. VII, §§ 1,2. Md. Const. arts. XI-A, XI-E.

The chart then shows that the difference in source of authority does not account for the difference in extent of authority between cities.[35] Given the complex variety of local governments, it is submitted that municipal antitrust immunity, once recognized, could not predictably be confined to any clear category of local governments. The Tenth Circuit's decision will thus result in massive and unacceptable intrusions on antitrust policy, and should be rejected.

CONCLUSION

There is no indication that *City of Lafayette* has caused the difficulties for local governments which the dissent feared. Indeed, the cases suggest that the most visible result is the elimination of many unnecessary and unjustified municipally-imposed monopolies and other restraints on trade. Such salutary consequences should be encouraged, the *City of Lafayette* standard should be upheld, and the decision below by the Tenth Circuit Court of Appeals should therefore be reversed and the case remanded for reinstatement of the preliminary injunction.

Respectfully submitted,

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[35] See also footnote 14.

APPENDIX TO THE BRIEF

IN THE DISTRICT COURT
IN AND FOR THE
COUNTY OF WELD AND STATE OF COLORADO

CITY OF GREELEY, a Municipal corporation, *Plaintiff,* vs. GREELEY VIDEO, INC., a Colorado corporation, *Defendant.*	Civil Action No. 80 CV 270
GREELEY VIDEO, INC., a Colorado corporation, *Plaintiff,* vs. THE CITY COUNCIL OF THE CITY OF GREELEY, THE MEMBERS OF THE CITY COUNCIL OF THE CITY OF GREELEY, in their capacity as councilpersons, and THE CITY OF GREELEY, *Defendants.*	Civil Action No. 80 CV 859

MEMORANDUM OF DECISION

These cases arise out of the effort of the City of Greeley to cancel the license of Greeley Video, Inc., to operate a cable television system in Greeley. Since the factual situation and the legal principles involved are the same in both cases, the basis

for the decision of the Court in both can be stated in this memorandum. Separate judgments will be entered in each case in accordance with the relief requested.

Civil Action No. 80 CV 270 is an action for declaratory relief. In that action the City is plaintiff, and seeks a declaratory judgment establishing (a) that Greeley Video, Inc., the defendant in that action, had voluntarily abandoned and surrendered its permit; (b) that Greeley Video is estopped from denying such abandonment; and (c) that the City is entitled to revoke the permit of Greeley Video.

In Civil Action No. 80 CV 859 the parties are reversed. This is an action under Rule 106, C.R.C.P., seeking a determination that the action of the City Council of the City of Greeley in revoking the permit of Greeley Video was arbitrary, capricious, unlawful, in excess of its jurisdiction, and void.

The City of Greeley is a home rule city. Article XVIII of the Charter of the City of Greeley is entitled "Franchises and Public Utilities." Operators of "closed television circuits" are included within the definition of the term public utility in Section 18-1 of that article. Section 18-3 of that article provided that franchises shall be granted only "upon the majority vote of the qualified taxpaying electors voting thereon at a special election called for such purpose."

Section 18-9 of the same article is as follows:

> The Council shall have the power to grant a permit for the temporary use or occupation of any street, alley or public place. Such permit shall be revocable at the pleasure of the Council whether the right be expressly reserved in the permit or not.

In Article III of the Charter, Section 3-11 provides as follows:

> The Council may provide for licenses and permits and fees therefor, for regulatory or revenue purposes. The Council shall hear and decide appeals relating to issuance, suspension or revocation of licenses or permits.

On January 2, 1968, the City Council of the City of Greeley adopted Ordinance No. 1-1968. This ordinance is now Chapter 7A of the Greeley Code of Ordinances.

That chapter requires that any person seeking to operate a cable distribution system within the City of Greeley shall secure a "non-exclusive permit" before commencing to operate such a system.

Section 7A-5 of that chapter makes the following provision regarding such permits:

> The right of the permittee to use the streets and public ways of the city and conduct its business in the city shall be nonexclusive, and the city reserves the right to grant a similar use or uses in said streets and public ways and authorize additional cable system business in the city.

Section 7A-4 of the chapter provides in part as follows:

> The right, permit and privilege authorized in this chapter are subject to revocation by the city council, at its pleasure and discretion at any time.

On January 16, 1968, a permit under Chapter 7A to operate a cable television system within the City of Greeley was issued to Greeley Video.

In its initial application Greeley Video had agreed to install its system in about a year from the date of its being granted the permit, although the exact time of construction and operation was to be dependent upon the receipt of certain permits from other parties. On December 17, 1968, the City Council approved the modification of the completion term of the permit to require that Greeley Video would begin construction on its system within 60 days after approval of the project by the Federal Communications Commission.

No approval of the application by the Federal Communications Commission was secured until 1975. By order of the F.C.C. adopted March 31, 1975, and released April 7, 1975, the application of Greeley Video was approved and it was ordered that an appropriate certificate of compliance be issued.

Thereafter a period elapsed during which there was correspondence by Greeley Video to the City Manager of Greeley, generally unanswered, in which the prospects of actual construction of the system was discussed; however, no actual construction was undertaken.

The problem chiefly causing the delay was the fact that there was no feasible method of transmitting signals for television programs originating in distant parts of the nation to the Greeley area. The construction of a microwave system from the nearest point of signal availability, Farmington, New Mexico, would have been inordinately expensive.

In 1977 and 1978 there was developed a plan of transmission by satellite which led to the solution of the economic problem. Signals from the satellite could be picked up for local distribution by a relatively inexpensive antenna system.

The largely one-sided correspondence from Greeley Video to Greeley officials continued. This correspondence set forth a series of target dates, which were constantly postponed, by which Greeley Video would bring the proposed system into existence. The last such target date in this series of correspondence was November 1, 1979.

In the meantime, however, the City Council had come to the conclusion that it wished to reconsider its position concerning the cable TV system.

On October 24, 1978, the City Council, acting as a committee of the whole, by consensus decided to recommend that an ordinance be prepared to establish a franchise system for cable TV in Greeley.

On July 21, 1979, the City Council, again acting as a committee of the whole, adopted a recommendation that there be a moratorium on the construction of a system by Greeley Video under its existing permit, and that a procedure be adopted for the review of the license and consideration of applications by other interested firms. This course of action was adopted in a resolution enacted by the council on August 7, 1979, and the moratorium was established as 75 days beginning August 8, 1979. The moratorium was ultimately extended until March 31, 1980.

During the moratorium period a lengthy review was conducted of the cable TV situation, including visits to examine facilities operated by applicant firms. Greeley Video was one of the firms given consideration, and apparently placed second.

This review procedure culminated on February 19, 1980, when, according to the minutes of the Greeley City Council meeting of that date, the following action was taken:

> A motion was made by Princic, seconded by Terry, to select Storer Cable TV as the cable TV operator for Greeley. Motion carried: 5-0.
>
> A motion was made by Murphy, seconded by Terry, to refer to the Committee-of-the-Whole the alternatives between the permit system and franchise system, and the subject matter to be negotiated with Storer Cable TV. Motion carried: 5-0.

There was additional correspondence between the city officials and Greeley Video relative to the permit held by Greeley Video, the intent of the city to revoke the same, and the intent of Greeley Video to proceed with construction regardless of the threatened revocation. Other collateral matters were also discussed.

On April 2, 1980, the complaint in Civil Action No. 80 CV 270 was filed, seeking the declaratory relief mentioned above.

After the filing of that action Greeley Video proceeded with the actual construction of its system, despite the objections of the city. Substantial expenditures have been made in the construction of that system; however, the great bulk of such expenditures were made after Greeley Video became aware of the intent and desire of the City of Greeley to revoke its permit.

On September 9, 1980, and September 16, 1980, hearings were held concerning the revocation of the permit of Greeley Video. The only witness appearing in support of the revocation was the City Manager, Mr. Peter Ray Morrell. A number of witnesses appeared in behalf of Greeley Video, Inc., in opposition to the revocation.

On September 23, 1980, the Greeley City Council passed its Resolution No. 57, 1980, the salient portions of which are as follows:

> WHEREAS, the City Council having considered all the evidence presented finds that Greeley Video has not complied with the terms of its application for the subject permit and has not complied with the provisions of Chapter 7A of the Greeley City Code, and the requirements of said permit in its installation of cable television in the City of Greeley and
>
> WHEREAS, it is in the best interest of the people of the City of Greeley for their common good and welfare that said permit should be revoked or terminated.
>
> NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF GREELEY, COLORADO, that the permit for the installation of cable television which was issued to Greeley Video, Inc. by resolution dated January 16, 1968 is hereby revoked and terminated by the City of Greeley.

The validity of these revocation proceedings is challenged by Greeley Video, Inc., in Civil Action No. 80 CV 859.

This is the general background of this case, and the Court may now consider the specific claims being made by the parties.

DID GREELEY VIDEO ABANDON THE PERMIT?

In the original action it was the contention of the City of Greeley that Greeley Video had abandoned its permit, and therefore no longer possessed it. As the cases have progressed, the City has not precisely abandoned this theory, but the subsequent revocation proceedings carry the implication that the permit was not voluntarily abandoned.

But even in the absence of such revocation proceedings, no real evidence of abandonment was presented. It is true that a long period of time elapsed between the granting of the permit and the commencement of construction on the system. Delays

were, however, largely caused by circumstances beyond the control of Greeley Video, Inc., and accordingly, the delay does not provide the necessary evidence of an intention to abandon. *Cf. Hoff* v. *Girdler Corp.*, 104 Colo. 56, 88 P.2d 100 (1939).

IS GREELEY VIDEO, INC., ESTOPPED TO DENY THAT IT ABANDONED AND RELINQUISHED ITS PERMIT?

One of the claims initially asserted by the City is that Greeley Video, Inc. is estopped to deny that its permit has been abandoned. Here again the evidence does not support the contention.

The claimed estoppel arises primarily from certain remarks made by Mr. Bill Daniels, principal in the parent firm of Greeley Video, Inc., in the course of a meeting held January 9, 1979 in which the Greeley City Council was sitting as a committee of the whole. It is also claimed that the subsequent cooperation of Greeley Video, Inc. in the evaluation of various aspirants for a Greeley permit constituted an estoppel.

Viewed in context, the remarks of Mr. Daniels cannot be taken as a statement that Greeley Video was prepared to abandon its permit.

Nor does the evidence indicate that the City changed its position in response to these statements or the subsequent actions of Greeley Video, Inc. The complaint alleges that a great deal of time was spent by the City; however, the process for review of the outstanding permit had commenced on October 24, 1978, when the City Council, acting as a committee of the whole, decided to recommend the preparation of an ordinance to establish a franchise system. This was before Mr. Daniels had made his statement.

The complaint also alleges that "the City of Greeley and its representatives . . . have invested a substantial amount of money" because of the representations of Greeley Video, Inc. No evidence of the amount of such expenditures was introduced.

Since there was no showing of a change of position by the City in justified reliance on representations of Greeley Video, Inc., the claim of estoppel cannot be sustained. *Susman* v. *Exchange National Bank*, 117 Colo. 12, 183 P.2d 571 (1947).

IS THE PERMIT REVOCABLE WITHOUT CAUSE?

Both parties agree that the permit in question is revocable, but disagree whether some cause is necessary for its revocation.

> Although a lawfully issued license or permit may not strictly be property, it has some of the aspects of property and is entitled to protection against arbitrary revocation. . . .While it is true that a license carries no property right, a license once granted may not normally be revoked at the mere option or whim of the licensor.
>
> 9 McQuillin, *Municipal Corporations*, Section 26.81a (1978).
>
> Courts will reverse municipal decisions to revoke licenses and permits when the local determination was arbitrary or unreasonable, in the sense that termination of the authorization granted was not necessary to protect the public health, safety, morality or welfare.
>
> 3 Antieau, *Municipal Corporation Law*, Section 24.42 (1979).

Provisions of ordinances providing for forfeiture of licenses must be reasonable, or they will not be upheld. *McInerney* v. *Denver*, 17 Colo. 302, 29 P. 516 (1892).

Under the Greeley Charter and ordinances, the discretion vested in the City Council to revoke permits is wide, but it may not be exercised in an arbitrary, unreasonable or discriminatory manner. *Restaurants of Wichita, Inc.* v. *Wichita*, 215 Kan., 636, 527 P.2d 969 (1974); *Marrone* v. *City Manager*, 329 Mass., 378, 108 N.E. 2d 553 (1952).

WAS THE REVOCATION OF THE PERMIT OF GREELEY VIDEO, INC. VALID?

Civil Action No. 80 CV 859 challenges the validity of the revocation of the permit of Greeley Video. It is brought under Rule 106, C.R.C.P., so the review by this Court is limited to a determination of whether the City Council, in revoking the permit, exceeded its jurisdiction or abused its discretion. The question in such a case is not whether the Court agrees with the decision of the City Council, but whether the action of the City Council was supported by competent evidence.

The absence of finding by the City Council is not fatal to its decision if there is evidence in the record which supports its conclusions. *Cooper* v. *Civil Service Commission*, Colo. App., 604 P.2d 1186 (1979). The record of the City Council action should not be so vague, however, as to prevent the reviewing court from determining the basis for their action. *Board of County Commissioners* v. *Salardino*, 136 Colo. 421, 318 P. 596 (1957); *Geer* v. *Presto*, 135 Colo. 536, 313 P.2d 980 (1957).

In the revocation proceedings, a very large number of ordinance and permit violations were charged to Greeley Video. Although no formal statement of charges was ever presented, in the opening statement of the attorneys presenting the evidence against Greeley Video before the Council, reference was made to a substantial number of claimed violations. During the hearings before the Council additional claimed violations surfaced.

One of the principal problems confronted by this Court in reviewing this case is the fact that despite the large variety of charges available, the order revoking the permit contains no statement whatsoever setting forth the specific violations upon which it is based. This Court, accordingly, has no clear basis for deciding whether the conclusions of Council justified revoking the permit.

Although this Court must review the case on the record, it may consider material facts which stand out so clearly that this Court cannot excape noticing them. It may give proper consideration to such facts as necessary to determine whether

the board has exceeded its jurisdiction or abused its discretion. This is not substituting the discretion of the Court for the decision of the City Council. *Board of Adjustment* v. *Perlmutter*, 131 Colo. 230, 280 P.2d 1107 (1955).

The Court noted that the City had apparently condoned a number of the acts which were charged as violations in the revocation proceedings. Some of the delays complained of were occasioned at least in part by acts of the City or its agents regarding moratorium, permit delays or refusals and the like. Virtually all of the major violations were known to the Council at the time it conducted its extensive review of the permit. Yet the Council apparently felt that such defaults and violations did not render Greeley Video, Inc. unfit to conduct a cable TV business in Greeley. Council permitted the participation of Greeley Video in its review proceedings, visited facilities operated by the parent organization of Greeley Video, accepted contributions from Greeley Video, Inc. to the travel expenses of its members, and apparently considered Greeley Video, Inc. second only to the favored Storer firm in making its final selection.

These facts, and record as a whole, lead this Court inescapably to the conclusion that the real reason for the revocation of the Greeley Video permit was not the commission of the defaults and violations considered at the hearing, but rather the desire of the Council to carry out its resolution selecting "Storer Cable TV as the cable TV operator for Greeley."

The Court in no way impugns the motives of the members of City Council. The Court is certain that the members conscientiously believe that the Storer firm would be the better operator. The Court surmises from the arguments of counsel in this case that the reason for reticence on the point is concern about possible antitrust violations. Whether such concerns are well founded is not for this Court to say as antitrust matters are principally the concern of the Federal Courts.

The question before this Court is whether the City Council was justified under the ordinance scheme presently in force in the City of Greeley in revoking the permit previously granted to Greeley Video in order to enable Storer Cable TV to be *the* cable TV operator for Greeley.

But Chapter 7A of the Greeley Code of Ordinances does not establish an exclusive license system. The permits under that chapter are specifically stated to be nonexclusive and the City has reserved the right to grant similar permits to others. Thus the revocation of the permit of Greeley Video is not necessary to enable Storer Cable TV, to be *a* cable TV operator in Greeley, as envisioned by Chapter 7A of the ordinances. It would, of course, be necessary to enable Storer Cable TV to be *the* cable TV operator for Greeley.

The revocation of the permit of Greeley Video, Inc., is unnecessary to achieve the purposes of Chapter 7A of the Greeley Code of Ordinances, therefore, it must be considered to be arbitrary or unreasonable. 3 Antieau, *Municipal Corporation Law*, Section 24.42.

The City Council may believe that under present circumstances a competitive system is not feasible for cable TV in the City of Greeley. If so, its recourse is to alter the ordinance. *Bauer* v. *Wheat Ridge*, 182 Colo. 324, 513 P.2d 203 (1973). It may be noted, however, that nonexclusive arrangements in local cable TV franchising are recommended by some authorities as a method of assuring continuing technical improvements. Note, 27 *Drake Law Review* 401 (1977-1978).

Under the ordinance system presently in force in the City of Greeley the action of the City Council in revoking the permit of Greeley Video, Inc. is in excess of that body's jurisdiction, and is an abuse of its discretion. Accordingly, the Court will enter judgment that the revocation is void.

CONCLUSION

Judgments will enter in these cases in accordance with the foregoing Memorandum.

DATED January 30, 1981.

BY THE COURT:

_____

District Judge

IN THE DISTRICT COURT
IN AND FOR THE
COUNTY OF WELD AND STATE OF COLORADO

Civil Action No. 80 CV 859

GREELEY VIDEO, INC., a Colorado corporation,

Plaintiff,

vs.

THE CITY COUNCIL OF THE CITY OF GREELEY, THE MEMBERS OF THE CITY COUNCIL OF THE CITY OF GREELEY, in their capacity as councilpersons, and THE CITY OF GREELEY,

Defendants.

JUDGMENT

Based on the Memorandum of Decision of the Court filed concurrently herewith, and the Findings of Fact and Conclusions of Law set forth therein, it is

ORDERED, ADJUDGED AND DECREED by the Court as follows:

1. The action of the defendant City Council and defendant members thereof in adopting The City of Greeley, Colorado, Resolution No. 57, 1980, entitled A Resolution Revoking the Cable T. V. Permit Issued to Greeley Video, Inc., was an abuse of the discretion of said defendants and was void.

2. The permit for the installation of cable television which was issued to plaintiff by resolution of the defendant City Council dated January 16, 1968, is unrevoked.

3. Plaintiff shall have judgment for its costs.

Dated January 30, 1981.

BY THE COURT:

District Judge

IN THE DISTRICT COURT
IN AND FOR THE
COUNTY OF WELD AND STATE OF COLORADO

Civil Action No. 80 CV 270

CITY OF GREELEY, a Municipal corporation,
Plaintiff,
vs.
GREELEY VIDEO, INC., a Colorado corporation,
Defendant.

JUDGMENT

Based on the Memorandum of Decision of the Court filed concurrently herewith, and the Findings of Fact and Conclusions of Law set forth therein, it is

ORDERED, ADJUDGED and DECREED by the Court as follows:

1. Defendant has not voluntarily abandoned and surrendered the revocable permit to operate a cable television system in the City of Greeley, Colorado, granted by plaintiff to defendant on January 16, 1968, and has not waived and relinquished its right, title or interest therein.

2. Defendant is not estopped from denying that it has abandoned and relinquished the said revocable permit, and is not estopped from asserting any right, title or interest therein.

3. The said revocable permit may be revoked by plaintiff for reasonable cause, in the discretion of the City Council of plaintiff.

4. Defendant shall have judgment for its costs.

Dated January 30, 1981.

BY THE COURT:

District Judge

MUNICIPAL AUTHORITY

	Source of Authority				Extent of Authority			
	Directly from Constitution	From Legislature authorized by Constitution	From Legislature only	Home rule powers granted by legislature	Home rule gives complete local authority if no conflict with state legislation	Ordinance prevails over conflicting statute on matters of local concern	Charter ordinance prevails over conflicting special state legislation	City can act on statewide concerns in absence of prohibitions preemption by State
Alabama[1,*]			X	X				
Alaska[2]	X				X			X
Arizona[3]	X				X	X		X
Arkansas[4]			X		X			
California[5]	X				X	X		X
Colorado[6]	X				X	X		
Connecticut[7]		X			X	X		
Delaware[8]			X		X			
Florida[9]		X		X				
Georgia[10]		X			X		X	
Hawaii[11]		X			X		X	
Idaho[12]	X				X		X	
Illinois[13]	X				X			
Indiana[14]			X		X			
Iowa[15]			X	X				
Kansas[16]	X				X		X	
Kentucky[17]			X	X				
Louisiana[18]		X		X				
Maine[19]	X				X			X
Maryland[20]	X				X		X	
Massachusetts[21]	X				X		X	X
Michigan[22]	X				X			X
Minnesota[23]	X				X		X	
Mississippi[24]			X	X				
Missouri[25]	X				X			
Montana[26]	X				X			
Nebraska[27]	X				X	X		
Nevada[28]		X		X				
New Hampshire[29]		X		X				
New Jersey[30]	X				X		X	
New Mexico[31]	X				X	X		
New York[32]		X			X			
North Carolina[33]		X		X				
North Dakota[34]		X		X				
Ohio[35]	X				X	X		
Oklahoma[36]	X				X	X		
Oregon[37]	X				X	X		
Pennsylvania[38]	X			X				
Rhode Island[39]	X				X		X	
South Carolina[40]		X		X				
South Dakota[41]	X				X			
Tennessee[42]	X				X		X	
Texas[43]	X				X		X	
Utah[44]	X				X		X	
Vermont[45]			X	X				
Virginia[46]		X		X				
Washington[47]	X				X		X	
West Virginia[48]		X		X				
Wisconsin[49]	X				X			
Wyoming[50]	X				X		X	
Puerto Rico[51]			X		X			

* Supporting footnotes located on reverse side of this chart

[1] Ala. Code § 11-40-1; *Colvin* v. *Ward*, 189 Ala. 198, 66 So. 98 (1914).

[2] Alas. Const. art. X, § 11; *Jefferson* v. *State*, Sup. Ct. Op. No. 1084, 527 P.2d 37 (Alas. 1974); *Rubey* v. *Fairbanks*, 456 P.2d 570 (Alas. 1969).

[3] Ariz. Const. art. XIII, §§ 2-3; *City of Tuscon* v. *Arizona Alpha of Sigma Alpha Epsilon*, 67 Ariz. 330, 195 P.2d 562 (1948).

[4] Ark. Stat. Ann. §§ 19-1042, 19-1043; *Beharse* v. *City of Blytheville*, 254 Ark. 382, 493 S.W.2d 708 (1973).

[5] Cal. Const. art. XI, §§ 2,3,5-7; *Sonoma County Organization of Public Employees* v. *County of Sonoma*, 23 Cal.3d 296, 152 Cal.Rptr. 903, 591 P.2d 1 (1979); *Bishop* v. *San Jose*, 1 Cal.3d 56, 81 Cal.Rptr. 465, 460 P.2d 137 (1969).

[6] Colo. Const. art XX, § 6; *Delong* v. *City & County of Denver*, 195 Colo. 27, 576 P.2d 537 (1978);*Century Electric Service and Repair* v. *Stone*, 193 Colo. 181, 564 P.2d 953 (1977).

[7] Conn. Const. art X, § 1; Conn. Gen. Stat. Ann. §§ 7-188, 7-191a, 7-194; *Caulfield* v. *Noble*, 178 Conn. 81, 420 A.2d 1160 (1979).

[8] Del. Code. Ann. tit. 22, § 801-602; *Gage* v. *City of Wilmington*, 293 A.2d 555 (Del. Supr. 1972).

[9] Fla. Const. art. VIII, § 2; *State* v. *Roca*, 172 So.2d 230 (Fla. 1965).

[10] Ga. Const. art IX, § 3, ¶ 1; *Lee* v. *City of Jesup*, 222 Ga. 530, 150 S.E.2d 836 (1966).

[11] Haw. Const. art. VII, §§ 1-2; *Hawaii Government Employees' Ass'n* v. *County of Maui*, 59 Hawaii 65, 576 P.2d 1029 (1978).

[12] Idaho Const. art XII, §§ 1-2; *Bagley* v. *Gilbert*, 63 Idaho 494, 122 P.2d 227 (1942); *Voyles* v. *City of Nampa*, 97 Idaho 597, 548 P.2d 1217 (1976).

[13] Ill. Const. art VII, § 6 (a,i); *City of Urbana* v. *Houser*, 67 Ill.2d 268, 10 Ill.Dec. 239, 367 N.E.2d 692 (1977).

[14] Ind. Code Ann. § 18-1-1.5-16; *City of Bloomington* v. *Chuckney*, 165 Ind.App. 177, 331 N.E.2d 780 (Ind. App. 1975) (although holding here that power had been denied by statute).

[15] *Wilson* v. *City of Council Bluffs*, 253 Iowa 162, 110 N.W.2d 569 (1961).

[16] Kan. Const. art. XII, § 5; *Claffin* v. *Walsh*, 212 Kan. 1, 509 P.2d 1130 (1973); *City of Junction City* v. *Griffin*, 227 Kan. 342, 607 P.2d 459 (1980); *Junction City* v. *Lee*, 216 Kan. 495, 532 P.2d 1292 (1975).

[17] Ky. Rev. Stat. Ann. §§ 83.410-63.420; *Reconstruction Finance Corp.* v. *City of Richmond*, 249 Ky. 787, 61 S.W.2d 631 (1933).

[18] La. Const. art. VI, §§ 2-6; *Bradford* v. *City of Shrevport*, 263 La. 364, 305 So.2d 487 (1974).

[19] Me. Const. art. VIII, Pt. 2, § 1; *Lewiston Firefighter Ass'n, Local 785* v. *City of Lewiston*, 354 A.2d 154 (1976) (although field here found to have been preempted).

[20] Md. Const. arts XI-A, XI-E; *State's Atty* v. *City of Baltimore*, 274 Md. 597, 337 A.2d 92 (1975); *Birge* v. *Town of Easton*, 274 Md. 635, 337 A.2d 435 (1975).

[21] Mass. Const. art of amend. II; *Board of Appeals of City of Hanover* v. *Housing Appeals Com.*, 363 Mass. 339, 294 N.E.2d 393 (1973); *Bloom* v. *City of Worster*, 363 Mass 136, 293 N.E.2d 268 (1973).

[22] Mich. Const. art. VII, § 22; *Miller* v. *Fabius Township Bd, St. Joseph County*, 366 Mich. 250, 114 N.W. 2d 205 (1962).

[23] Minn. Const. art. XII, §§ 1-4; *A.C.E. Equipment* v. *Erickson*, 277 Minn. 457, 152 N.W.2d 739 (1967); *Town of Lowell* v. *City of Crookston*, 252 Minn. 526, 91 N.W.2d 81 (1958).

[24] Miss. Code Ann. § 21-17-1; *Steitenroth* v. *Jackson*, 99 Miss. 354, 54 So. 955 (1911).

[25] Mo. Const. art. VI, § 18; *St. Louis County* v. *Campbell*, 498 S.W.2d 833 (1973).

[26] Mont. Const. art. XI, §§ 5-6; *U.S. Mfg. & Distrib. Corp.* v. *City of Great Falls*, 169 Mont. 298, 546 P.2d 522 (1976).

[27] Neb. Const. art. XI, § 5; *City of Omaha* v. *Lynch*, 181 Neb. 810, 151 N.W.2d 278 (1967); *Dwyer* v. *Omaha-Douglas Public Bldg. Comm'n*, 188 Neb. 30, 195 N.W. 2d 236 (1972).

[28] Nev. Const. art. VIII, § 8; *Ronnow* v. *City of Las Vegas*, 57 Nev. 332, 65 P.2d 133 (1937).

[29] N.H. Const. Pt. I, art XXXIX; *City of Dover* v. *Wentworth-Douglas Hosp. Trustees*, 114 N.H. 123, 316 A.2d 183 (1974).

[30] N.J. Const. art. IV, § 7; *Inganamort* v. *Burough of Fort Lee*, 62 N.J. 521, 303 A.2d 298 (1973) (although case doesn't find conflict between ordinance and statute).

[31] N.M. Const. art. X, § 6; *Apodaca* v. *Wilson*, 86 N.M. 516, 525 P.2d 876 (1974).

[32] N.Y. Const. art. IX, §§ 1-2; *People* v. *Cook*, 34 N.Y.2d 100, 356 N.Y.S.2d 259, 312 N.E.2d 452 (1974).

[33] N.C. Const. art VII, § 1; *In re Incorporation of Indian Hills*, 280 N.C. 659, 186 S.E.2d 909 (1972).

[34] N.D. Const. art. VII, § 1; *Litten* v. *City of Fargo*, ____N.D.____, 294 N.W.2d 628 (1980).

[35] Ohio Const. art. XVIII, §§ 3,7; *Canada* v. *Phillips*, 168 Ohio St. 191, 151 N.E.2d 722 (1958).

[36] Okla. Const. art. XVIII, § 3(a); Okla. Stat. Ann. art. XI, § 13-109; *Lee* v. *Norick*, 447 P.2d 1015 (1968); *City of Wewoka* v. *Rodman*, 172 Okla. 630, 46 P.2d 334 (1935); *Pitts* v. *Allen*, 138 Okla. 295, 281 P.126 (1929); *Lackey* v. *Grant*, 29 Okla. 255, 116 P. 913 (1911).

[37] Ore. Const. art. XI, § 2; *Heinig* v. *City of Milwaukie*, 231 Ore. 473, 373 P.2d 680 (1962); *Schmidt* v. *City of Cornelius*, 211 Ore. 505, 316 P.2d 511 (1957); *City of Portland* v. *Welch*, 154 Ore. 286, 59 P.2d 228 (1936).

[38] Pa. Const. art. IX, § 2; *United Tavern Owners of Philadelphia* v. *School Dist. of Philadelphia*, 441 Pa. 274, 272 A.2d 868 (1971).

[39] R.I. Const. art. of amend. XXVIII, §§ 2-4; *Marro* v. *General Treasurer of City of Cranston*, 108 R.I. 192, 273 A.2d 660 (1971) (although statute found controlling here).

[40] S.C. Const. art. VIII, §§ 9,11; *Dunbar* v. *Spartanburg*, 266 S.C. 113, 221 S.E.2d 848 (1976).

[41] S.D. Const. art. IX, § 2.

[42] Tenn. Const. art IX, § 2; *Southern Ry. Co.* v. *City of Knoxville*, 223 Tenn. 90, 442 S.W.2d 619, Cert. den. 396 U.S. 1002 (1968).

[43] Tex. Const. art. XI, § 6; *Lower Colorado River Auth.* v. *City of San Marcos*, 523 S.W. 2d 641 (1975).

[44] Utah Const. art. XI, § 5; *Wadsworth* v. *Santaquin City*, 83 Utah 321, 28 P.2d 161 (1933) (although case deals with "general law" city).

[45] Vt. Stat. Ann. tit. 24, § 1971.

[46] Va. Const. art. VII, §§ 1-3; *Tabler* v. *Board of Supervisors of Fairfax County*, _____Va._____, 269 S.E.2d 358 (1980). But see also *Kisley* v. *City of Falls Church*, 212 Va. 695, 187 S.E.2d 168, appeal dismissed for want of a substantial federal question, 409 U.S. 907 (1972) for holding that city may, in exercise of its police powers, forbid an act where the state is silent.

[47] Wash. Const. art. XI, § 10; *City of Everett* v. *Fire Fighters Local 350*, 87 Wash. 2d 572, 555 P.2d 418 (1976).

[48] W.Va. Const. art. VI, § 39(a); *Toler* v. *City of Huntington*, 153 W.Va. 313, 168 S.E.2d 551 (1969).

[49] Wisc. Const. art. XI, § 3; *Glendale Professional Policemen's Assoc.* v. *City of Glendale*, 83 Wisc. 2d 90, 264 N.W.2d 594 (1978).

[50] Wyo. Const. art. XIII, § 1.

[51] P.R. Laws Ann. tit. 21, § 1107; *Cabassa* v. *Rivera*, 68 P.R.R. 654 (1948).